21—138

Judge Field

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~379~~. 99

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, OF MASSACHUSETTS, PLAINTIFF IN ERROR,

vs.

SIDNEY W. SEA, FOR THE USE OF DANIEL K. PEARSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 21, 1872.

Oct. Dec. 18

SUPREME COURT OF THE UNITED STATES.

No. 379.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, OF MASSACHUSETTS, PLAINTIFF IN ERROR,

vs.

SIDNEY W. SEA, FOR THE USE OF DANIEL K. PEARSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Transcript from State court	4	1
Bond for costs	18	8
Plaintiff ruled to file declaration in ten days	19	8
Declaration	20	9
Copy of insurance policy annexed to declaration	40	17
Demurrer to declaration	50	21
Demurrer overruled, and leave to plead	51	21
Plea of defendant	52	21
Stipulation as to matters of defense	53	22
Stipulation to submit cause without jury	53	22
Cause heard and taken under advisement	54	23
Judgment versus defendant	55	23
Bill of exceptions:		
Testimony of S. W. Sea	56	23
Exhibit A, policy of insurance attached to declaration	40	17
Exhibit B, proof of loss	57	24
Exhibit C, agreement between Pearsons and Sea	66	27
Exhibit C, copy agreement between Pearsons and Sea	74	30
Testimony of Daniel K. Pearsons	77	32
Testimony of James H. Moore	79	33
Testimony of J. N. Dunham	81	34
Appeal bond	85	35
Certificate to transcript	87	36
Writ of error	88	36
Citation and service	90	37
Assignment of error	91	37

3 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, circuit judge of the United States of America for the seventh judicial circuit, on Friday, the twelfth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearson,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company of Springfield, Massachusetts.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-two, there was filed in the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a transcript of a record in the superior court of Cook County, in the State of Illinois, in the above-entitled cause, which said transcript, and also the bond for
4 costs, filed therewith, are respectively in the words and figures following, to wit:

Transcript.

UNITED STATES OF AMERICA,
State of Illinois, county of Cook, ss:

Pleas before the honorable the judges of the superior court of Cook County, in the State of Illinois, at a regular term of said superior court of Cook County, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the first day of April, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth.

Present, the honorable William A. Porter, chief justice of the superior court of Cook County; Joseph E. Gary and John A. Jameson, judges; Charles H. Reed, prosecuting attorney; T. M. Bradley, sheriff of Cook County.

Attest:

AUGUSTUS JACOBSON, *Clerk.*

Be it remembered that heretofore, to wit, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-two, Sidney W. Sea, for the use of Daniel K. Pearson,
5 by Spafford, McDaid & Wilson, his attorneys, filed in the office of the clerk of the superior court of Cook County his certain præcipe and bond for cost, which are in the words and figures as follows, to wit:

Superior court of Cook County, M'ch term, A. D. 1872.

STATE OF ILLINOIS,
Cook County, ss:

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearson, plaintiff,
vs.
THE SPRINGFIELD FIRE & MARINE INSURance Co. of Springfield, Mass., defendant.
} Damages $10,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of ten thousand dollars; direct the same to the sheriff of Cook County to execute, and make it returnable to the April term of said court, A. D. 1872.

SPAFFORD, McDAID & WILSON,
Plaintiff's Attorneys.

To AUGUSTUS JACOBSON, esq., clerk.
CHICAGO, *M'ch* 15, 1872.

Superior court of Cook County.

Bond.

S. W. SEA, USE, &C.,
vs.
SPRINGFIELD FIRE & MARINE INS. CO.

6 I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 15th day of M'ch, A. D. 1872.

SPAFFORD, McDAID & WILSON.

And thereupon, on the day and year last aforesaid, to wit, March 15th, 1872, there issued out of said clerk's office the people's writ of summons, which said writ, together with the return of the sheriff endorsed upon the same, is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon the Springfield Fire and Marine Insurance Company of Springfield, Massachusetts, if it shall be found in your county, personally to be and appear before the superior court of Cook County on the first day of the term thereof, to be holden at the court-house in Chicago, in said Cook County, on the first Monday of April next, to answer unto Sidney W. Sea for the use of Daniel K. Pearsons, in a plea of trespass on the case upon promises, to the dam-
7 age of said plaintiff, as it is said, in the sum of ten thousand dollars, and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Augustus Jacobson, clerk of our said court and the seal thereof, at Chicago aforesaid, this 15th day of March, A. D. 1872.

[SEAL.] A. JACOBSON, *Clerk.*

Served the within writ by reading the same and by delivering a copy thereof to C. H. Case, an agent of said company, the president of the within-named company not being a resident of this county and not being found in my county, this 19th day of March, 1872.

T. M. BRADLEY, *Sheriff*,
By H. B. GALPIN, *Deputy*.

Fees: Service, .50; copy, .50; mileage, .10; return, .10—1.20. Paid by def't's att'y.

And afterwards, to wit, on the 1st day of April, in the year last aforesaid, the defendant by Grant & Swift, its attorneys, filed in said clerk's office its certain petition, affidavit of Edmund Freeman, and bond, which are in the words and figures following, to wit:

In the Superior court of Cook County, in the county of Cook and State of Illinois.

8 SIDNEY W. SEA FOR THE USE DANIEL K. Person,
against
THE SPRINGFIELD FIRE AND MARINE Insurance Company.

To the honorable the superior court of Cook County, in the county of Cook, and State of Illinois:

The petition of the Springfield Fire and Marine Insurance Company, a corporation created under and by the laws of the State of Massachusetts, at Springfield, in said State of Massachusetts, respectfully shows: that your petitioner is the defendant in this suit and that the same was brought by Sidney W. Sea, plaintiff, on or about the nineteenth day of March, 1872, in the superior court of Cook County, to be held in said Chicago, in the county of Cook and State of Illinois, and that the said plaintiff is, and was at the time of bringing this suit, a citizen of the State of Illinois, and your petitioner is and was a citizen, at the time of bringing this suit, of the State of Massachusetts.

And your petitioner further shows that the said plaintiff claims in the summons and complaint in this suit, as damages against your petitioner, the sum of ten thousand dollars, and that the matter in dispute in this suit, therefore, exceeds the sum of five hundred dollars ex-
9 clusive of costs, and that said suit is brought against your petitioner as sole defendant for the purpose of recovering the amount of an alleged loss by fire, under an alleged policy of insurance against fire.

Your petitioner further represents that said suit has not been tried, and that it has not heretofore appeared therein; that it is desirous to remove said suit into the next circuit court of the United States, to be held in the northern district of Illinois in the seventh circuit, in pursuance of the provisions of law as contained in the act of Congress approved September 24th, A. D. 1789, entitled An act to establish the judicial courts of the United States.

Your petitioner further represents that it is ready and willing to give such good and sufficient surety as this court may direct, for its doing all acts and things required to be done by said provisions of law, upon the removal of a suit into the United States court, and it offers herewith its bond executed by as surety in the penal sum of

dollars, conditioned that your petitioner shall enter in the next circuit court of the United States, to be held in the northern district of Illinois, in the seventh circuit, on the first day of its session, copies of all said process and pleadings in said suit against it, and doing such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety, according to the provisions of law aforesaid upon the removal of a suit into the United States court.

10 And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States, to be held in the northern district of Illinois, in the seventh circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray.

[SEAL.] SPRINGFIELD FIRE AND MARINE INS. CO.,
By E. FREEMAN, *Pres't.*

STATE OF MASSACHUSETTS,
County of Hampden, ss:

Edmund Freeman, above named, being duly sworn, deposes and says that he is the president of the defendant in the above-named action, the Springfield Fire and Marine Insurance Company; that he has, in behalf of said company, read the foregoing petition, and subscribed the same in behalf of said company, and knows the contents thereof; and that the same is true, of his own knowledge, except as to any matters therein stated on information and belief, and as to those matters he believes it to be true, and further saith not.

E. FREEMAN.

Subscribed and sworn to this 25th day of March, A. D. 1872, before me.

A. L. SOULE,
Justice of the Peace.

10½ [5-cent rev. stamp canceled.]

THE COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

I, George B. Morris, clerk of the supreme judicial court, which is a court of record for the county and Commonwealth aforesaid, do certify that A. L. Soule, esq., whose signature is affixed to the certificate on the paper hereto annexed, was at the date thereof one of the justices of the peace within and for said county, duly commissioned and acting under the authority of this Commonwealth; and that full faith and credit is and ought to be given to his acts and attestations done in that capacity; and that I am acquainted with the handwriting of the said A. L. Soule, and believe his signature to said certificate is genuine; also, that the instrument hereto annexed is executed and acknowledged according to the laws of this Commonwealth for the purposes therein expressed.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme judicial court, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] GEO. B. MORRIS.

In the superior court of Cook County, in the county of Cook and State of Illinois.

11 SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearsons,
against
THE SPRINGFIELD FIRE AND MARINE INSURance Company.

STATE OF MASSACHUSETTS,
County of Hampden, ss:

Edmund Freeman, being duly sworn, deposes and says that he is a citizen of Massachusetts aforesaid, and resides at Springfied, in said State of Massachusetts; that he is the president of the defendant in the above-entitled action; that said defendant is a corporation created under and by the laws of said State of Massachusetts, at said Springfield, and is a citizen of said State of Massachusetts; that the said action against said the Springfield Fire and Marine Insurance Company was brought on or about the nineteenth day of March, A. D. 1872, in the superior court of Cook County, in the county of Cook and State of Illinois; and this deponent further says that he has reason to believe, and does believe, that from prejudice and local influence the said defendant will not be able to obtain justice in said court, and therefore makes this affidavit for the purpose of removing said suit into the circuit court of the United States for the northern district of Illinois, in the seventh circuit, in pursuance of the statute of the United States in such case made and provided, and further saith not.

12 E. FREEMAN, *Pres't.*

Subscribed and sworn to this twenty-fifth day of March, A. D. 1872 before me.

[SEAL.] A. L. SOULE,
Justice of the Peace.

[5-cent rev. stamp canceled.]

THE COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

I, George B. Morris, clerk of the supreme judicial court, which is a court of record for the county and Commonwealth aforesaid, do certify that A. L. Soule, esq., whose signature is affixed to the certificate on the paper hereto annexed, was at the date thereof one of the justices of the peace within and for said county, duly commissioned and acting under the authority of this Commonwealth, and that full faith and credit is and ought to be given to his acts and attestations done in that capacity, and that I am acquainted with the handwriting of the said A. L. Soule, and believe his signature to said certificate is genuine; also, that the instrument hereto annexed is executed and acknowledged according to the laws of this Commonwealth for the purposes therein expressed.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme judicial court this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] GEO. B. MORRIS, *Clerk.*

13 **Bond.**

In the superior court of Cook County and State of Illinois.

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearsons,
against
THE SPRINGFIELD FIRE AND MARINE INSURance Company.

We, the Springfield Fire and Marine Insurance Company, a corporation established under and by the laws of the State of Massachusetts, at Springfield, in the county of Hampden in said State, as principal, and Geo. H. Laflin, of Chicago, Ill., as surety, are held and firmly bound unto Sidney W. Sea, of the county of Cook and State of Illinois, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said Sidney W. Sea, his successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves and our heirs, executors, and administrators firmly by these presents, sealed with our seals. Dated this twenty-fifth day of March, A. D. 1872.

The condition of this obligation is such that whereas a suit was brought on or about the nineteenth day of March, A. D. 1872, in the superior court of Cook County, in the county of Cook and State of Illinois, by the said Sidney W. Sea, against the said Springfield Fire and Marine Insurance Company, and the same is now pending for trial in said superior court in said city, county, and State, and is re-
14 movable into the circuit court of the United States for the northern district of Illinois in the seventh circuit, under the act of Congress, approved September 24th, A. D. 1789, entitled An act to establish the judicial courts of the United States; and whereas the said The Springfield Fire and Marine Insurance Company has filed its petition in said superior court for the removal of said suit into the next circuit court of the United States to be held in the northern district of Illinois:

Now, therefore, if the above bounden The Springfield Fire and Marine Insurance Company, or its legal representatives, shall enter or cause to be entered in the circuit court of the United States for the northern district of Illinois, on the first day of its stated session next ensuing after the order of the said superior court for the removal of said suit into said circuit court, copies of all process and pleadings and other proceedings in said suit, and do or cause to be done such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue; the said The Springfield Fire and Marine Insurance Company having caused its corporate seal to be hereto affixed, and these presents to be subscribed by its president, Edmund Freeman, thereto duly authorized.

15 The Springfield Fire and Marine Insurance Company,
[SEAL.] By E. FREEMAN,
Pres't.
GEO. H. LAFLIN.

STATE OF MASSACHUSETTS,
County of Hampden:

I certify that on this 25th day of March, A. D. 1872, before me personally appeared Edmund Freeman, and, being duly sworn, did depose and say that he is the president of the Springfield Fire and Marine In-

surance Company above named, that he is authorized to execute the foregoing bond for said company, and that he executed the same by authority and in behalf of said company as its free act and deed.

A. L. SOULE,
Justice of the Peace.

[5-cent rev. stamp canceled.]

THE COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

I, George B. Morris, clerk of the supreme judicial court, which is a court of record for the county and commonwealth aforesaid, do certify that A. L. Soule, esq., whose signature is affixed to the certificate on the paper hereto annexed, was at the date thereof one of the justices of the peace within and for said county, duly commissioned and acting under the authority of this commonwealth, and that full faith and credit is and ought to be given to his acts and attestations done in that capacity, and that I am acquainted with the handwriting
16 of the said A. L. Soule, and believe his signature to said certificate is genuine; also, that the instrument hereto annexed is executed and acknowledged according to the laws of this commonwealth for the purposes therein expressed.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme judicial court this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] GEO. B. MORRIS,
Clerk.

And thereupon, on the day and year last aforesaid, the same being one of the days of the April term of said court, the following among other proceedings were had in said court and entered of record, to wit:

1,000.] [37,787.

SIDNEY W. SEA, FOR USE OF DANIEL K. Pearsons,
vs.
THE SPRINGFIELD FIRE AND MARINE Insurance Company of Springfield, Massachusetts. } Assumpsit.

This day comes the plaintiff to this suit, by Spafford, McDaid & Wilson, his attorneys, and the defendant, by Grant and Swift, its attorneys, also comes and files herein its petition based on affidavit to remove said cause to the United States circuit court in and for the northern district of the State of Illinois; and it appearing to the court
17 that the said defendant has filed herein its bond, conditioned according to the act of Congress in such case made and provided—

It is ordered by the court that said cause be and the same is hereby transferred to the said United States circuit court, and that the clerk of this court do forthwith transmit to said United States circuit court a transcript of all papers and pleadings in said cause, together with all orders made and entered of record herein.

STATE OF ILLINOIS,
Cook County:

I, Augustus Jacobson, clerk of the superior court of Cook County, in

and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of all the papers and pleadings in file in my office, and of all orders made and entered of record in said court in a certain cause lately pending in said court, on the common-law side thereof, wherein Sidney W. Sea, for use, &c., was plaintiff, and Springfield Fire & Marine Ins. Co., &c., was defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 26th day of April, A. D. 1872.

[SEAL OF COURT.] A. JACOBSON,
Clerk.

[5-cents rev. stamp canceled.]

(Endorsed:) Filed April 28, 1872. W'm H. Bradley, cl'k.

18 *Bond for costs.*

Circuit court, March term, A. D. 1872.

UNITED STATES OF AMERICA,
Northern District of Illinois:

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearson,
vs.
THE SPRINGFIELD FIRE & MARINE INSURance Company. } In

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and, in default of payment by the defendant of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 29th day of April, A. D. 1872.

GRANT & SWIFT.

(Endorsed:) Filed April 29th, A. D. 1872. W'm H. Bradley, clerk.

On this day, to wit, the 11th day of May, in the adjourned May term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

19 *Order to file declaration.*

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearsons,
vs.
THE SPRINGFIELD FIRE & MARINE INSURance Company of Springfield, Mass. } Assumpsit.

On motion of the defendant by his attorney, the plaintiff is hereby ruled to file his declaration herein within ten days, and in default thereof it is ordered that this cause be dismissed.

On this day, to wit, the 22d day of July, A. D. 1872, came said plaintiff by his attorneys, and filed in said court with the clerk thereof his declaration against said defendant in said entitled cause, which said declaration is in the words and figures following, to wit:

20 *Declaration.*

In the United States circuit court for the northern district of the State of Illinois.—Of the May term, A. D. 1872.

Sidney W. Sea, plaintiff in this suit, who sues for the use of Daniel K. Pearsons, by Spafford, McDaid & Wilson, his attorneys, complains of the Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, a corporation established and existing under the laws of the State of Massachusetts, who has been summoned, &c., of a plea of trespass on the case on promises:

For that whereas heretofore, to wit, on the thirtieth day of April, A. D. 1870, at Chicago, to wit, at the county of Cook aforesaid, by a certain instrument in writing, or policy of insurance, then and there made under the hands of L. Freeman, the president, and S. J. Hall, the secretary of the said corporation, and countersigned by S. M. Moore & Co., the agents of said company at Chicago aforesaid, the said L. Freeman, S. J. Hall, and S. M. Moore & Co., acting and being duly authorized to act on behalf of the said corporation, the said Springfield Fire & Marine Insurance Company, in consideration of one hundred & twenty
21 dollars ($120) to them paid, the receipt whereof was thereby acknowledged, did thereby insure the said plaintiff against loss or damage by fire to the amount of eight thousand dollars, ($8,000,) being one thousand dollars on each of his (said plaintiff's) eight two-story frame with brick basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138, and 140 Elm street, between Clark and La Salle streets, in the city of Chicago, in the county of Cook aforesaid.

And the said defendant, for the consideration aforesaid, did in and by the said policy promise and agree to make good unto the said plaintiff, his executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured as aforesaid, as should happen by fire to the property, as above specified, during three years, to wit, from the first day of May, one thousand eight hundred & seventy, (at noon,) unto the first day of May, one thousand eight hundred and seventy-three, (at noon,) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same might happen, and to be paid within sixty days after due notice and proof thereof, made by the said plaintiff in conformity with the conditions of the said policy: provided always, and it was thereby declared, that the said defendant should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and it was moreover declared that the said policy was made and accepted
22 upon the terms and conditions set forth in said policy, which terms and conditions are fully set forth in a copy of said policy attached to this declaration and hereby made part thereof and marked Exhibit A, and reference is hereby made to said copy of said policy for the said terms and conditions of said policy.

And the said plaintiff avers that it was further provided in the said policy that the loss, if any, should be payable to Daniel K. Pearsons by the name of D. K. Pearsons, as his interest might appear. And the said plaintiff further avers that it was further provided in said policy that the said plaintiff might procure other insurance upon the property covered by the said policy without notice to the said defendant until required. And the said plaintiff further avers that at the time of the making of the said policy of insurance, and from thence until the loss and

damage hereinafter mentioned, he had an interest in the said insured premises and property to a large amount, to wit, to the amount of all the money by him insured thereon, to wit, at the county of Cook aforesaid; and that afterwards, to wit, on the ninth day of October, one thousand eight hundred & seventy-one, the said premises and property in the said policy of insurance mentioned were burnt, consumed, and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said plaintiff sustained damages to a
23 large amount, to wit, the amount of money thereon assured, to wit, at Chicago, in the county aforesaid; and the said plaintiff further avers that the buildings in the said policy mentioned were not at any time after said policy was issued occupied in any way so as to render the risk more hazardous than at the time said insurance was effected, nor was the risk after the said insurance was effected increased by any means whatever within the control of the said plaintiff; and the said plaintiff further avers that he forthwith after the said loss, to wit, on the twenty-fifth day of October, A. D. 1871, gave notice thereof to the said defendant; and as soon thereafter as possible, to wit, on the eighth day of November, A. D. 1871, at Chicago, in the county of Cook aforesaid, did deliver to the said defendant as particular an account of his loss and damage as the nature of the case would admit, signed by the said plaintiff, and accompanied the same with the oath of the said plaintiff that said account was in all respects true and just, and showing in said account what other insurance had been made on the said property, and giving a copy of the written portion of the policy of each company insuring thereon; what was the whole value of the premises and property insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the buildings insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such buildings, and when and how the fire originated, so far as he knew or believed, and his interest in the property insured at
24 the time of the loss or damage aforesaid; and the said plaintiff further avers that, although he has in all things observed, performed, and fulfilled all and singular the matters and things which on his part were to be observed, performed, and fulfilled according to the form and effect of said policy of insurance, and although he had sustained loss and damage on occasion of said fire to a large amount, to wit, to the amount of all the insurance upon the premises and property destroyed as aforesaid, yet the said defendant has not paid to the said plaintiff the said sum of money so by the said defendant insured as aforesaid, or repaid or re-imbursed the said loss sustained by the said fire as aforesaid, although often requested, or any part thereof, but the sum so insured as aforesaid, and the said loss and every part thereof, still remains wholly in arrear and unpaid, contrary to the form and effect of the said policy of insurance so by the said defendant in that behalf made as aforesaid.

And, also, for that whereas the said defendant heretofore, to wit, on the thirtieth day of April, in the year of our Lord one thousand eight hundred & seventy, at Chicago, in the county of Cook aforesaid, on the application of the said plaintiff, made a certain other policy of insurance in writing, whereby the said defendant, in consideration of one hundred & twenty dollars to it in hand paid by the said plaintiff, the receipt whereof was thereby acknowledged, did insure the said Sidney W. Sea against loss or damage by fire to the amount of eight
25 thousand dollars, as follows, to wit: one thousand dollars ($1,000)

on each of his eight two-story frame with brick basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138, and 140 Elm street, between Clark & La Salle streets, Chicago, in the county of Cook aforesaid.

And the said defendant, for the consideration aforesaid, did in and by said policy promise and agree to make good unto the said plaintiff, his executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property as above specified during three years, to wit, from the first day of May, one thousand eight hundred & seventy, (at noon,) unto the first day of May, one thousand eight hundred & seventy-three, (at noon;) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same might happen, and to be paid within sixty days after due notice and proof thereof, made by the said plaintiff in conformity with the conditions of the said policy: provided always, and it was in and by said policy declared, that the said defendant should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and the said policy was made and accepted upon the following terms and conditions, to wit:

26 "1. Applications for insurance must specify the construction and materials of the building to be insured, as containing the property to be insured, by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to adjoining and surrounding buildings, and their construction and materials, and whether any manufactory is carried on within or about it; and in relation to the insurance of goods and merchandise, application must state what description of goods and merchandise are to be insured.

"If any person insuring any building or goods in this office shall make any misrepresentation or concealment, or if at the time of the renewal of a policy of insurance the risk of the building shall have been increased by any means whatsoever since the making of the original insurance; or if after insurance is effected, either by original policy or by renewal thereof, the risk shall be increased by any means whatever within the control of the assured; or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If during the insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured or his representative of their intention to do so; in which case the company will refund a ratable proportion of the premium.

"2. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

27 "3. Property held in trust, on sale or on commission, must be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void.

"4. Policies of insurance subscribed by the company shall not be as-

signable without the consent of the company expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or any interest in it, the liability of the company in virtue of such policy shall thenceforth cease; and the company reserves to itself the right to elect either to consent to the transfer or return a ratable proportion of the premium, for the time of the risk unexpired, and cancel the policy; and in case of any change of title in the property hereby insured, or if the premises insured shall be vacated, and so remain for thirty days without notice to the company, this policy shall cease and determine.

"5. Notices of all previous insurance upon property insured by this company shall be given to them and endorsed on the policy or
28 otherwise assented to by the company in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect, and in case of subsequent insurance on property insured by this company, notice thereof must also, with all reasonable diligence, be given to them to the end that such subsequent insurance may be indorsed on the policy subscribed by this company, or otherwise assented to in writing; in default whereof, such policy shall thenceforth cease and be of no effect, and in all cases of insurance, this company shall be liable only for such ratable proportion of the loss or damage happening to the subject insured, as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies.

"6. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and it is mutually understood that there can be no abandonment to the insurers of the subject insured. This company will not be liable for any loss or damage caused by lightning, by the explosion of a steam-boiler, or of any explosive substance, except that which results from fire that may ensue therefrom; nor for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; nor will the company be liable for goods stolen.
29 Whenever a building insured by this policy, or containing property insured by this policy, shall fall without the agency of fire, this policy shall therefrom cease and determine.

"7. Books of accounts, written securities or evidences of debt, title-deeds, writings, and money or bullion, are not deemed objects of insurance.

"8. Casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, plate-glass in doors and windows when plates are the dimensions of three square feet and more, paintings, plate, & precious stones, printed music, prints, sculpture, statuary, and watches, are not deemed to be included in any insurance, unless particularly specified in the policy.

"9. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, and they shall accompany the same with their oath or affirmation declaring said account to be true and just, showing also whether any and what other insurance has been made on the same property, and giving a copy of the written portion of the policy of each company insuring thereon; what was the whole value of the subject insured, in what general manner (as to trade, manufactory, merchandise, or otherwise) the

building insured or containing the subject insured and the several
30 parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe. When merchandise or other personal property is partially damaged the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods, and shall cause a list or inventory of the same to be made, naming the quality and cost of each kind. The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon, and whenever required in writing the insured or person claiming shall produce and exhibit his books of accounts and other vouchers to the insurers, or their agent, at the office of this company in support of his claim, and permit extracts and copies thereof to be made, and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, or when such appraisal has not been made, or if it be refused by claimant when required as above, the loss shall not be payable. All fraud or false swearing shall cause a forfeiture of all claims on the insurer, and shall be a full bar to all remedies against the insurer on the
31 policy.

"10. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or to repair the building or buildings within a reasonable time; and it is hereby an express condition of this policy that the company may enter the premises to rebuild or repair them, giving notice of their intention to do so, within twenty days after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties.

"11. Payment of losses shall be made in sixty days after the loss shall have been been ascertained and proved, without any deduction whatever.

"12. Insurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same, and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party in-
32 sured to make, when the risk has been changed, either within itself or by the surrounding or adjacent buildings; and if at or before the time of renewing any policy of insurance on property where the risk has been increased by the erection of buildings or by the use or occupation of the premises insured, or of the neighboring premises, the assured shall fail to give information thereof, the said policy and renewal shall be void and of no effect.

"13 Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers pro rata, in the proportion that

the whole sum insured bears to the whole value of the proprerty insured, of which proof in due form shall be made by the claimant.

"14. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviations from the laws or regulations of police, made to prevent accidents from fire in places where laws and regulations on the subject exist."

Said policy of insurance also contained the following provisions, to wit: "Camphene, spirit-gas, burning fluid, phosgene, or any other inflammable liquid, when used in stores or warehouses as a light, subjects the goods therein to an additional charge, and permission for such use must be endorsed in writing on the policy, otherwise the insurance shall be void. Gunpowder and saltpetre, crude coal-oil, nap'tha, ben-
33 zine, or benzole or benzine varnish, are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandize insured by this policy, unless by special consent in writing on this policy."

And the said plaintiff further avers that it was in and by said policy further provided that the loss, if any, should be payabl' to Daniel K. Pearsons by the name of D. K. Pearsons, as his interest might appear; and that it was also provided, in writing, upon the face of said policy; that other insurance was permitted without notice to the said defendant until required; and the said plaintiff avers that at the time of the making of the said policy of insurance as aforesaid, and from thence until the loss and damage hereinafter mentioned, the said plaintiff had an interest in the said insured property to a large amount, to wit, to the amount of all the money insured thereon, to wit, at the county of Cook aforesaid.

And the said plaintiff further avers that after the said insurance was effected the risk was not increased by any means whatever within the control of the said plaintiff; and that said buildings or premises were not occupied in any way so as to render the risk more hazardous than at the time of insuring.

And the said plaintiff avers that afterwards, to wit, on the ninth day of October, A. D. 1871, the said property in the said policy of insurance mentioned was burnt, consumed, and destroyed by fire, which did
34 not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said plaintiff sustained damage to a large amount, to wit, the amount of the money on said property insured, to wit, at Chicago, in the county aforesaid.

And the said plaintiff further avers that he forthwith, after the said loss, to wit, on the twenty-fifth day of October, A. D. 1871, gave notice thereof to the said defendant, and as soon thereafter as possible, to wit, on the eighth day of November, 1871, at Chicago, in the county aforesaid, did deliver to the said defendant, in writing, as particular an account of the loss and damage aforesaid as the nature of the case would admit, signed with his own hand, and accompanied the same with his oath, declaring the said account to be true and just; showing also what other insurance had been made on the same property, and giving a copy of the written portion of the policy of each company insuring thereon; what was the whole value of the property insured; in what general manner (as to trade, manufactory, merchandize, or otherwise) the buildings insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such buildings, and when and how the fire originated, so far as he knew or believed, and

the interest of the said plaintiff in the property insured at the time of the loss or damage aforesaid.

And the said plaintiff further avers that although he has in all things observed, performed, and fulfilled all and singular the matters
35 and things which on his part were to be observed, performed, and fulfilled according to the form and effect of said policy of insurance, and although loss and damage on occasion of said fire has been sustained to a large amount, to wit, the amount aforesaid, and although more than sixty days have elapsed since due notice and proof of said loss was made & delivered to said defendant as aforesaid, in conformity with the conditions of the said policy, yet the said defendant has not paid the said sum of money so by it insured as aforesaid, or repaid, or re-imbursed the said loss sustained by the said fire as aforesaid, although often requested so to do, or any part thereof, but the sum so insured as aforesaid, and the said loss and every part thereof still remains wholly in arrear and unpaid, contrary to the form and effect of the said policy of insurance so by the said defendant in that behalf made as aforesaid.

And, also, for that whereas the said defendant heretofore, to wit, on the thirtieth day of April, A. D. 1870, at Chicago, in the county of Cook aforesaid, on the application of the said plaintiff made a certain other policy of insurance in writing, whereby the said defendant, in consideration of one hundred & twenty dollars to it in hand paid, the receipt whereof was thereby acknowledged, did insure the said Sidney W. Sea against loss or damage by fire to the amount of eight thousand dollars, to wit, one thousand dollars ($1,000) on each of his eight
36 two-story frame with brick basement dwellings, situate and known as numbers 126, 128, 130, 132, 134, 136, 138, and 140 Elm street, between Clark and La Salle streets, Chicago, Ill's.

And the said defendant, for the consideration aforesaid, did in and by the said policy promise and agree to make good unto the said plaintiff, his executors, administrators or assigns, all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property above specified during three years, to wit. from the first day of May, A. D. 1870, (at noon,) unto the first day of May, A. D. 1873, (at noon,) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same might happen; and to be paid within sixty days after due notice and proof thereof, made by the said plaintiff in conformity with the conditions of the said policy; provided always, and it was in and by said policy declared, that the said defendant should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

And the said plaintiff avers that said policy was made and accepted upon certain terms and conditions therein set forth, and which terms and conditions the said plaintiff avers were and are in all respects the same as those set forth and contained in the second count herein
37 above set out, as by the said policy of insurance will, when produced, more fully appear, reference being thereto had.

And the said plaintiff avers that it was further provided in writing, upon the face of the said policy, that other insurance was permitted without notice to the said defendant until required, and that the loss, if any, should be payable to the said Daniel K. Pearson, by the name of D. K. Pearson, as his interest might appear; and the said plaintiff avers that the said Daniel K. Pearsons is in equity entitled to the money insured by said policy as aforesaid; and the said plaintiff further avers

that at the time said policy was made he fully explained & made known to the said defendant his interest in and title to the property covered by said insurance as aforesaid, and that there was no change in the title of said property after the making of said policy; and that the said premises did not at any time after the making of said policy remain vacant for thirty days.

And the said plaintiff avers that at the time of the making of the said policy of insurance, and from thence until the loss and damage hereinafter mentioned, the said plaintiff had an interest in the said insured property to a large amount, to wit, to the amount of all the money insured thereon, to wit, at Chicago, in the county of Cook aforesaid; and that afterward and on, to wit, the ninth day of October, A. D. 1871, the said property in the said policy of insurance mentioned
38 was burnt, consumed, and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said plaintiff sustained damage to a large amount, to wit, the amount of the money on said property insured, to wit, at Chicago, in the county of Cook aforesaid, and the said plaintiff avers that after the said insurance was effected the risk was not increased by any means whatever within the control of the assured, nor were said buildings or premises occupied in any way so as to render the risk more hazardous than at the time of insuring.

And the said plaintiff further avers that he forthwith after the said loss, to wit, on the twenty-fifth day of October, A. D. 1871, gave notice thereof to the said defendant, and as soon thereafter as possible, to wit, on the eighth day of November, A. D. 1871, at Chicago, in the county aforesaid, the said plaintiff did deliver to the said defendant in writing as particular an account of the loss and damage aforesaid as the nature of the case would admit, signed with his own hand, and accompanied the same with his oath, declaring the said account to be true and just, showing also what other insurance had been made on the same property, and giving a copy of the written portion of the policy of each company having insurance thereon; what was the value of the property insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the buildings insured and the several parts thereof were
39 occupied at the time of the said loss, and who were the occupants of the said buildings, and when and how the said fire originated, so far as he knew or believed, and also the interest of the said plaintiff in the property insured.

And the said plaintiff avers that he has in all things observed, performed, and fulfilled all and singular the matters and things which on his part were to be observed, performed, and fulfilled, according to the form and effect of said policy of insurance, and although loss and damage on occasion of said fire has been sustained to a large amount, to wit, the amount aforesaid, and although more than sixty days have elapsed since due notice and proof thereof as aforesaid, yet the said defendant has not paid the said sum of money so by it insured as aforesaid, or repaid or re-imbursed the said loss sustained by the said fire aforesaid, although often requested so to do, or any part thereof, but the sum so insured as aforesaid, and the said loss and every part thereof, still remains in arrear and wholly unpaid, contrary to the form and effect of the said policy of insurance so by the said defendant in that behalf made as aforesaid, to the damage of said plaintiff of ten thousand dollars, ($10,000,) and therefore he brings suit, &c.,

SPAFFORD, McDAID & WILSON,
Plaintiff's Attorneys.

40 (Copy.)

No. 7909.] EXHIBIT A. [$8,000.

By this policy of insurance the Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, in consideration of one hundred and twenty dollars, to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Sidney W. Sea, esq., against loss or damage by fire to the amount of eight thousand dollars, $1,000 on each of his eight two-story frame with brick basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138, & 140 Elm street, between Clark and La Salle streets, Chicago, Ill's. Other insurance permitted without notice until required. Loss, if any, payable to D. K. Pearsons, as his interest may appear, 3 y'rs,
41 $8,000, @ 1½, $120; and the said company do hereby promise and agree to make good unto the said insured, his executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, during 3 years, to wit, from the 1st day of May, one thousand eight hundred and seventy, (at noon,) unto the 1st day of May, one thousand eight hundred and seventy-three, (at noon;) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same may happen, and to be paid within sixty days after due notice and proof thereof, made by the insured in conformity with the conditions of this policy: provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and this policy is made and accepted upon the following terms and conditions, to wit:

1. Applications for insurance must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling or otherwise; its situation with respect to surrounding and adjoining buildings, and their construction and materials, and whether any manufactory is carried on within or about it; and in relation to the insurance of goods and merchandise, application must state what description of goods
42 and merchandise are to be insured. If any person insuring any building or goods in this office shall make any misrepresentation or concealment, or if at the time of the renewal of a policy of insurance the risk of the building shall have been increased by any means whatsoever since the making of the original insurance, or if after the insurance is effected either by original policy of insurance, or by the renewal thereof, the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If during the insurance the risk be increased by the erection of buildings or by the use or occupation of neighboring premises or otherwise, or if the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured or his representatives of their intention to do so, in which case the company will refund a rateable proportion of the premium.

2. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

3. Property held in trust, on sale, or on commission, must be insured

as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void.

4. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or any interest in it, the liability of the company in virtue of such policy shall thenceforth cease; and the company reserves to itself the right to elect either to consent to the transfer or return a rateable proportion of the premium for the time of the risk unexpired and cancel the policy, and in case of any change of title in the property hereby insured, or if the premises insured shall be vacated, and so remain for thirty days without notice to this company, this policy shall cease and determine.

5. Notice of all previous insurance upon property insured by this company shall be given to them and indorsed on this policy or otherwise assented to by the company in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect; and in case of subsequent insurance on property insured by this company, notice thereof must also with all reasonable diligence be given to them, to the end that such subsequent insurance may be indorsed on the policy subscribed by this company, or otherwise assented to in writing, in default whereof such policy shall thenceforth cease and be of no effect; and in all cases of insurance this company shall be liable only for such ratable proportion of the loss or damage happening to the subject insured as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies.

6. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and it is mutually understood that there can be no abandonment to the insurers of the subject insured. This company shall not be liable for any loss or damage caused by lightning, by the explosion of a steam-boiler, or of any explosive substance, except that which results from fire that may ensue therefrom; nor for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; nor will the company be liable for goods stolen. Whenever a building insured by this policy, or containing property insured by this policy, shall fall without the agency of fire, this policy shall thereupon cease and determine.

7. Books of accounts, written securities, or evidences of debt, title-deeds, writings, and money or bullion, are not deemed objects of insurance.

8. Casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, plate-glass in doors and windows when plates are the dimensions of three square feet and more, paintings, plate, precious stones, printed music, prints, sculptures, statuary, and watches, are not deemed to be included in any insurance unless particularly specified in the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice

thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath or affirmation, declaring said account to be true and just, showing also whether any and what other insurance has been made on the same property, and giving a copy of the written portion of the policy of each company insuring thereon; what was the whole value of the subject insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe. When merchandise or other personal property is partially damaged the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods; and shall cause a list or inventory of the same
46 to be made, naming the quantity and cost of each kind. The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon; and whenever required in writing, the insured, or person claiming, shall produce and exhibit his books of accounts and other vouchers to the insurers, or their agents, at the office of the company, in support of his claim, and permit extracts and copies thereof to be made; and shall also exhibit to any persons named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, or when such appraisal has not been made, or if it be refused by the claimant when required as above, the loss shall not be payable. All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy.

10. In case of any loss or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or to repair the building or buildings within a reasonable time; and it is hereby an express condition of this policy that the company may enter the premises to rebuild or repair them, giving notice of their inten-
47 tion to do so within twenty days after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties.

11. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, without any deduction whatever.

12. Insurance once made may be continued for such further time as may be agreed upon, the premium required therefor being paid and endorsed on the policy or a receipt given for the same; and all insurance, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings; and if, at or before the time of renewing any policy of insurance on property where the risk has been increased

by the erection of buildings, or by the use or occupation of the premises insured, or of the neighboring premises, the assessed shall fail to give information thereof, the said policy and renewal shall be void and of no effect.

13. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage
48 shall be borne by the insured and the insurers pro rata, in the proportion that the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

14. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviations from the laws or regulations of police, made to prevent accidents from fire in places where laws and regulations on this subject exist.

Camphene, spirit-gas, "burning fluid," phosgene, or any other inflammable liquid, when used in stores or warehouses as a light, subjects the goods therein to an additional charge; and permission for such use must be indorsed in writing on the policy, otherwise the insurance shall be void.

Gunpowder and saltpetre, crude coal-oil, nap'tha, benzine, or benzole or benzine varnish, are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on this policy. It is furthermore hereby expressly provided, that no suit or action of any kind against this company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of two years next after the loss or damage shall
49 occur. This policy shall not be valid until countersigned by the authorized agent of said Springfield Fire and Marine Insurance Company at Chicago.

In witness whereof the said Springfield Fire and Marine Insurance Company have caused these presents to be signed by their president, and attested by the secretary, at their office in Springfield, Massachusetts.

L. FREEMAN,
President.

Attest: S. J. HALL,
Secretary.

Countersigned at Chicago this 30th day of April, 1870.
S. M. MOORE & CO.,
Agents.

(Endorsed:) Filed May 22d, 1872. W'm H. Bradley, cl'k.

50 On this day, to wit, the 22d day of June, A. D. 1872, came said defendant by its attorneys and filed in said court with the clerk thereof its demurrer to the declaration in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to declaration.

Circuit court of the United States, northern district of Illinois.

SIDNEY W. SEA
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company of Springfield, Massachusetts.

And the said defendant, by Grant and Swift, its attorneys, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against it, the said defendant, and it the said defendant is not bound by law to answer the same, and this the said defendant is ready to verify; wherefore by reason of the insufficiency of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it, said defendant, &c.

51 GRANT AND SWIFT,
Def't's Att'ys.

(Endorsed:) Filed June 22, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the 9th day of July, in the July term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Demurrer overruled.

SIDNEY W. SEA, WHO SUES FOR THE USE OF Daniel K. Pearsons,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company of Springfield, Massachusetts. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration filed herein, and after hearing the arguments of counsel, the court overruled said demurrer with leave to the defendant to plead by Thursday morning next.

On this day, to wit, the 11th day of July, A. D. 1872, came said defendant by its attorneys, and filed in said court with the clerk thereof its plea in said entitled cause, which said plea is in the words and figures following, to wit:

52 *Plea.*

Circuit court of the United States, northern district of Illinois.

THE SPRINGFIELD FIRE AND MARINE INSURance Company of Springfield, Massachusetts,
ads.
SIDNEY W. SEA, WHO SUES FOR THE USE OF Daniel K. Pearsons.

And now comes the said defendant by Grant and Swift, its attorneys,

and defends the wrong and injury, when, &c., and says that it did not undertake or promise in manner and form as the said plaintiff has above thereof complained against it. And of this the said defendant puts itself upon the country.

GRANT AND SWIFT,
Def't's Att'ys.

(Endorsed:) Filed July 11th, 1872. W'm H. Bradley, cl'k.

53 On this day, to wit, the 11th day of July, A. D. 1872, the following stipulations of the said parties were filed in said court with the clerk thereof, which said stipulations are respectively in the words and figures following, to wit:

Stipulation as to matters of defense.

United States circuit court, northern district of Illinois.

SIDNEY W. SEA, FOR THE USE, &C.,
v.
THE SPRINGFIELD FIRE AND MARINE INSURance Company. } Assumpsit.

It is hereby stipulated by and between the parties hereto that the said defendant may offer any and every matter in defense to said suit, under the plea of general issue, with like effect as though the same had been specially pleaded.

Chicago, July 11, 1872.

SPAFFORD, McDAID & WILSON,
Att'ys for Plaintiff.
GRANT & SWIFT,
Att'ys for Def't.

(Endorsed:) Filed July 11th, 1872. W'm H. Bradley, cl'k.

Stipulation to waive jury.

In the circuit court of the U. S., northern dis't of Illinois, July term, 1872.

54 SIDNEY W. SEA, FOR USE OF D. K. Pearsons,
v.
THE SPRINGFIELD FIRE & MARINE INS. COMpany, of Springfield, Mass. } Assumpsit.

It is stipulated by the parties to the above-entitled suit that the same may be submitted to the Hon. Thomas Drummond, judge of said court, for trial, a jury in said cause being hereby waived.

Chicago, July 11th, 1872.

SPAFFORD, McDAID & WILSON,
Pl'ff's Att'ys.
GRANT & SWIFT, *Def't's Att'ys.*

(Endorsed:) Filed July 11, 1872. W'm H. Bradley, cl'k.

On the same day, to wit, the 11th day of July, in the July term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Cause heard & taken under advisement.

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearsons,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company, of Springfield, Massachusetts. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined by agreement they waive the intervention of a jury and for trial put themselves upon the court, and after hearing the evidence and the arguments of counsel, the court takes the same under advisement.

On this day, to-wit, the 12th day of July, in the July term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Judgment.

SIDNEY W. SEA, FOR THE USE OF DANIEL K. Pearson,
vs.
THE SPRINGFIELD FIRE & MARINE INSURANCE Company, of Springfield, Massachusetts. } Assumpsit.

The court having considered, and being now fully advised upon the matters heretofore submitted herein, finds the issue for the plaintiff and assesses his damages to the sum of seven thousand dollars.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of seven thousand dollars, his damages so as aforesaid assessed, together with his costs in this behalf expended, amounting to the sum of forty-seven dollars and forty-five cents, and that he have execution therefor.

56 On the hearing of said entitled cause the following exceptions were taken, and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of Illinois.

SPRINGFIELD FIRE INSURANCE CO.,
ads.
SIDNEY W. SEA, USE, &c. } Bill of exceptions.

Be it remembered that on the trial of the above-entitled cause the following evidence was introduced by the parties thereto, the cause having, by stipulation, been submitted to the court without the intervention of a jury.

SIDNEY W. SEA.—The plaintiff being called in his own behalf, upon direct examination testified as follows:

Policy of insurance and the proof of loss furnished to the defendant by the plaintiff, shown to the witness and introduced in evidence, hereto attached and made a part of this bill of exceptions and marked. Exhibits

A and B, which said Exhibit A is attached to the declaration in said entitled cause, and said Exhibit B is in the words and figures following, to wit:

Proof of loss.

EXHIBIT B.

No. of policy, 7909; amount, $8,000.

To the Springfield Fire and Marine Insurance Company of Springfield, Mass.:

By your policy of insurance, No. 7909, dated April 30th, 1870, issued at your agency at Chicago, Illinois, and continued by renewal, No. to the first day of May, 1873, you insured Sidney W. Sea, esq., against loss and damage by fire to the amount of eight thousand dollars, according to the terms and conditions printed in said policy, the written portion being as follows, viz.: Eight thousand dollars—$1,000 on each of his eight two-story frame with brick-basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138, and 140 Elm street, between Clark and La Salle streets, Chicago, Ill's. Other insurance permitted without notice, until required. Loss, if any, payable to D. K. Pearsons, as his interests may appear.

Also, there was other insurance on said property to the amount of eight thousand ($8,000) dollars, and no more, as follows, full itemized copies of the written portion of which policies and endorsements are hereunto annexed: $1,000 on each of his eight two-story frame with brick-basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138, & 140 Elm street, between Clark and La Salle streets, Chicago, Illinois. Other insurance permitted without notice, until required. Loss, if any, payable to D. K. Pearsons, as his interest may appear.

58 A fire occurred on the ninth day of October, A. D. 1871, at about the hour of 11 o'clock a. m., and originated as follows, viz, by reason of a general conflagration in the city of Chicago, commencing on October 8th, 1871, and extending into the night of October 9th, 1871.

The actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made, was as follows, viz:

	Sound value.	Loss or damage on same.	Insurance on same.
House No. 126 Elm st., Chicago, Ill's	$2,500.00	$2,500.00	$1,000.00
House No. 128 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 130 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 132 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 134 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 136 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 138 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
House No. 140 Elm st., Chicago, Ill's	2,500.00	2,500.00	1,000.00
Total sound value; total loss or damage; and total insurance	$20,000.00	$20,000.00	$8,000.00

For a more particular statement of same, see Schedule A, annexed.

Amount claimed of the Springfield Fire and Marine Insurance Company, $8,000.

The property insured belonged exclusively to Sidney W. Sea, having purchased the same by contract from D. K. Pearsons, the interest
59 of said Pearsons being the balance of the purchase-money due on said premises, and no other person or persons had any interest therein.

The building insured, or containing the property destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: W'm Arnett occupied No. 140 Elm st.; Isaac P. Coates occupied No. 138 Elm st.; E. R. Hooper occupied No. 136 Elm st.; Geo. A. Shufeldt, jr., occupied 134 Elm st.; Mrs. Cragin occupied 132 Elm st.; Rev. J. T. Westover occupied 130 Elm st.; J. M. Johnson occupied 128 Elm st.; Miss E. Herse occupied 126 Elm st.; all of whom were tenants of said S. W. Sea, and said buildings were all occupied as dwelling-houses.

The said fire did not originate by any act, design, or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him; that nothing has been done by or with his privity or consent to violate the conditions of the policy or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said company as to the extent of said loss has in any manner been made.

Any other information that may be required will be furnished on call and considered a portion of these proofs.

60 Witness my hand at Chicago this 8th day of November, 1871.

SIDNEY W. SEA.

STATE OF ILLINOIS,
County of Cook, ss:

November eighth, 1871.

Personally appeared Sidney W. Sea, signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said company should be advised of. Before me, a notary public in and for the city of Chicago, in said county and State.

[NOTARIAL SEAL.] JOHN C. BARKER,
Notary Public.

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, John C. Barker, a notary public residing in said city, and in and for said city, in said county and State, residing most contiguous to the property of said Sidney W. Sea, insured as set forth in the preceeding affidavit, certify that I am not concerned in that loss or claim, either as a creditor or otherwise, or related to the insured or sufferers, and that I am acquainted with the character and circumstances of said Sidney W. Sea, and having made diligent inquiry into the facts set forth in the foregoing statement, believe and know that said Sea really by misfortune, without fraud or evil practice, sustained by the described fire loss and damage to the amount of eight thousand dollars, the
61 sum stated in his said affidavit of loss.

In testimony whereof I have hereunto set my hand and official seal this eighth day of November, A. D. 1871.

[NOTARIAL SEAL.] JOHN C. BARKER,
Notary Public.

SCHEDULE A.

The property insured above named consisted of eight buildings or houses in one block, situated on the corner of Elm and North Clark streets, Chicago, Illinois.

The buildings, known by the numbers hereinbefore specified, were two stories, wooden buildings, with brick basements, and fitted for and used as dwelling-houses.

(Endorsed:) Springfield Fire and Marine Ins. Co., of Springfield, Mass. Proof of loss. Policy No. 7909. Agency, Chicago. Date of fire, Oct. 9. Amount of policy, $8,000; amount claimed, $8,000.

I am the person named in this policy. I obtained this insur-
62 ance. The houses therein were destroyed by fire October 9th, last year.

Q. What was the value of the houses at the time of the fire, and how many were there?

(Objected to by the defendant's counsel because it has not been shown that the witness is competent to testify as to their value.)

In answer to the court witness testified that he did not construct the houses, nor contract for their construction, but bought them after they were built. That at the time he bought them he inquired of some competent men, friends of his, as to their value; that he bought them in 1869, bought the houses and land together, and the houses and land together were at that time valued at $44,000; that he had spent nearly $1,000 in repairs upon the houses. Witness further testified that the two corner houses were renting at $60.00 a month, and the others at $50 a month, except the one which the plaintiff occupied; that they were two-story wooden houses, very well built, finished very well indeed; they occupied one hundred and fifty feet frontage, eight houses; that he thought they were fifty-six feet deep, but was not positive; that he had known the houses for six or seven years, and lived in one of them,
63 namely 136.

In answer to the court, witness testified that he had built several houses in 1864 and 1865—one in 1865, in Lake View, near Chicago, and two or three since that time on the West Side in Chicago; that he built a residence for himself in 1865, in Lake View, and had had charge of real estate ever since.

Q. State to the court now what was the value of those houses at the time they were burned.

(Objected to by the defendant's counsel because it has not been shown that the witness is competent to testify to their value; objection overruled, and exceptions taken by defendant.)

A. They were certainly not less than I should value them before, and I should suppose them to be worth about $3,000 apiece.

Q. You think they were worth about $3,000.00 apiece?

A. Yes.

Q. In the proofs of loss you mentioned them as being worth at least twenty thousand dollars; do you say they were worth that?

A. Yes, and more.

Witness further testified: The first arrangements of this insurance were made in my office; there was no written application made by me.

Q. Did you sign any written stipulation in regard to the title?

A. I think not. No; I ordered the insurance, and this agent
64 of Mr. Moore came in to me.

By defendant's counsel: Who was this man?

A. His name was Cornell, I think.

(Objection by defendant's counsel to anything said or anything done with Cornell, as he was not the agent of the defendant.)

By plaintiff's counsel. We propose to show they recognized him as such on the agreement which was made with the plaintiff, being presented to S. M. Moore & Co.

Witness further testified: I got this insurance at a low rate. I made this agreement in the winter.

By defendant's counsel. Was this agreement in writing?

A. The agreement between me and Mr. Moore was in writing.

Q. Have you it here?

A. No, sir; it was burned in my office.

Witness further testified that he never took the policy in his hand at all; that he ordered it to be sent directly from the office to Pearsons.

Q. Did they ask you anything at that time in regard to your title?

A. Yes; Mr. Moore spoke to me at that time.

Q. What Moore?

A. This Moore here (James H. Moore) said he had been looking
65 at the risk and thought the risk was rather inadequate, (that is, the premium pretty low,) but as he had made the agreement he should send the policy to Pearsons.

Q. What did they say in regard to Cornell's action?

A. That is all they said; that they thought the insurance pretty low, but they had made the agreement, and the policy should be sent to Pearsons.

Witness further testified that Cornell went to S. M. Moore & Co., the agents of the defendant, and got from them the written agreement for he insurance and gave it to him; that this agreement was signed by Moore & Co.; that at the same time he got this insurance he got $8,000 more in the Home at the same rate on the same property; that at the same time he had the talk with Moore about the premium he told him he had bought the property on long time and was pretty heavily in debt; asked Mr. Moore's opinion about the value of the property; told him he (witness) had bought it, how much he was in debt for it, and that this amount (of insurance) was to go for security for the indebtedness.

Witness further testified, in answer to the court, that at that time he had a contract (in writing) with Pearsons for the purchase of the property; that he had no deed. This was the contract:

66 *Agreement between Pearsons & Sea.*

EXHIBIT C.

Articles of agreement made this the first day of November, in the year of our Lord one thousand eight hundred and sixty-nine, between Daniel K. Pearsons, of Cook County, Illinois, and Sidney W. Sea, of county and State aforesaid, witnesseth, that if the said party of the second part shall first make the payment and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to

the said party of the second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty-deed, the following lots, pieces, or parcels of land, viz: lots thirteen, "13," fourteen, "14," fifteen, "15," sixteen, "16," seventeen, "17," in block nineteen, "19," Bushnell's addition to Chicago, Illinois; and the said party of the second part hereby covenants and agrees to pay the said party of the first part therefore the sum of forty thousand dollars, in the manner following: the sum of four thousand dollars annually on or before November first of each and every year, to wit, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, together with interest at the rate of eight per cent. per annum, payable semi-annually; and to further pay all taxes, assessments, or impositions that may be legally levied or imposed upon any or all of said lots, and will exhibit once a year, on demand of D. K. Pearsons, receipts of the proper persons to said party of the sec-
67 ond part, showing payment thereof until the indebtedness aforesaid shall be fully paid; and the said second party further covenants and agrees to keep all buildings that may at any time be on said premises insured in a good substantial insurance company or companies in a sum not less than sixteen thousand dollars, and will assign, with proper consent of the insurers, the policy or policies of insurance to said first party.

It is further stipulated and agreed that said second party, in making payment of said forty thousand dollars as aforesaid, may apply such payment upon such portion of said premises as shall be represented by the pro rata value of the same as hereinafter established and herein set forth, and upon the full payment for such portion of said premises, as the same is hereinafter valued, said second party shall be entitled, upon demand, to a deed in fee simple for such part of said premises for which such pro rata sum has been paid in full. And it is further agreed that no default which may be made or forfeiture declared on this instrument shall deprive said second party, his heirs or assigns, of the right to receive such a deed for such a portion of said property as shall be represented by any payment or payments that have so been made as aforesaid and for which no equivalent deed had already been given. And it is further stipulated and agreed that in the payment for a part of said premises with a demand for a deed for the same, said premises shall be paid for and
68 valued as follows, to wit: Lot "13," thirteen, at six thousand dollars; lot "14," fourteen, at six thousand dollars; house No. "140" on Elm street, with 18¾ feet ground fronting on said Elm street by 72 feet back therefrom, being ground whereon same is situate, at five thousand dollars; house No. "138," with 18¾ feet ground fronting on said Elm street by 72 feet back therefrom, being land whereon same is situate, at four thousand dollars; house No. "136," and 18¾ feet fronting on said Elm street by 72 feet back therefrom, being the ground whereon said house is situate, at thirty-four hundred dollars; houses No. "134," "132," "130," "128," with 18¾ feet of ground fronting on Elm street by 72 feet back therefrom, with each one being the ground whereon the same are respectively situate, at thirty-one hundred dollars each; house No. "126," with 18¾ feet fronting on Elm street by 72 feet back therefrom, at thirty-two hundred dollars. And in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, or to keep said building insured as aforesaid, this contract and all liability thereunder shall be forfeited and determined at the election of said party of the first part. It being, however, mutually agreed by and between the parties hereto that said second party shall have sixty days' grace after any default and

before a forfeiture can be declared upon this contract. In case this contract shall be forfeited as aforesaid, the said second party shall forfeit
69 all or any payments made by him in this contract, if such amount so paid shall be insufficient to pay for in full any part of said premises aforesaid as the same are appraised, and such payment shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by them sustained, and he shall have the right to re-enter and take possession. It is mutually agreed that the time of payment (due reference being had to the sixty days of grace aforesaid) shall be an essential part of this contract and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties. Witness our hands and seals the day and year first above mentioned.

DAVID K. PEARSONS. [SEAL.]
SIDNEY W. SEA. [SEAL.]

[Int. rev. stamp.]

Aug. 2, 1870. Rec. interest due May 1, 1870, $1,600.

Nov. 21st, 1870. Rec'd on within $4,000 & delivered deed to Mary W. Sea for house No. 138, & premises on which same is, &c.

Dec. 8, '70. Rec'd this day $1,600, sixteen hundred dollars, interest on within contract.

June 29th, '71. Rec'd this day on within $1,440, due May 1st, 1871, and interest on that sum since that date. 19..1459.

70 By the court. The policy was made payable to Pearsons in consequence of this indebtedness that you owed him under this contract?

A. Yes.

Q. Now state the conversation you had with Cornell fully.

(Objected to by defendant's counsel because it has not been shown that Cornell was the agent of the defendant, and defendant denies his agency.)

(Objection for the present overruled, the court stating that it might come in, subject to any evidence hereafter to be introduced touching Cornell's agency; exception taken by defendant's counsel.)

A. I was procuring other insurance at that time of Cornell for quite an amount.

Q. Who was he acting for?

A. For the same firm, S. M. Moore & Co.; furnished me other insurance along repeatedly upon other property; brought me policies and brought me this insurance. He stated to me he wanted to close these matters of insurance; we would take out this insurance and pay him for it at that time—which I did. He made out a written agreement that they would furnish me that insurance when I wanted it. I told him how the matter stood, and showed him the contract with Pear-
71 sons at the time, because he was in my office a good deal.

By the court. You showed Cornell the contract?

A. I did.

Q. You said he purported to act for Moore & Co?

A. He acted for them in this matter.

Q. Did you know he had been acting for them?

A. Yes; took money for them and brought me policies from them.

Q. What did Moore say in regard to this action?

A. Didn't make any objection; said he had taken this rather low

Q. Said he had taken it too low?

A. Yes; all the objection he made.

Witness further testified that the written agreement to furnish this insurance when needed at that price was brought from Moore & Co. to him by Cornell; that he took it back to them when he called for the policy of insurance. He further testified that he had furnished the defendant with proofs of loss subsequent to the fire; that they made no objections to the proofs of loss, except that they wrote a letter asking him for the contract under which he held the property; that he furnished them a sworn copy of the contract; that he took possession of the property at the time he took the contract from Pearsons; that he had tenants occupying the houses at the time of the fire; that at the time of the fire one of the houses had been deeded to his wife.

72 Q. How was it held by your wife?

A. Held by her until I wished to improve it—conditionally; that the deed from Pearsons to his wife was burned; that he did not suppose there was any copy, but that it was marked on the contract; that the consideration was paid by him entirely; that he lived in one of these houses; that he had paid on the contract, up to the time of the fire, something over eight thousand dollars, all that was due on the contract.

Upon cross-examination the witness testified as follows:

That he had done insurance business with Cornell several months before this insurance was procured; that Cornell procured a good part of his insurance; that he procured the other insurance for him upon these houses; that the written agreement furnished to him by Cornell was an agreement to furnish sixteen or twenty thousand dollars of insurance at a certain price, and was signed by Moore and Company; that the property was specified in the agreement; that there was nothing in the memorandum about the title of the property; that he thinks the companies in which this insurance was to be placed were mentioned in the agreement, but would not swear positively; that he thinks he retained this agreement among his papers; that this agreement between

73 Cornell and himself was made in his (witness's) office; that he did not show the contract with Pearsons to Mr. Moore; that his conversation at the office of S. M. Moore & Co. was with James H. Moore; that the contract with Pearsons has not been forfeited in any way; that he has paid taxes on the property since the fire; that he has not conveyed or released the property to Pearsons since the fire, but still holds the contract; that in November, 1870, one of the houses mentioned in the proofs of loss introduced in evidence was conveyed to his wife by Pearsons; that he cannot swear that the deed to his wife contained any declaration of trust in his favor; that the copy of the contract furnished by him to the defendant at the request of the defendant was taken from Pearsons' duplicate of the original contract hereto attached in evidence and marked Exhibit C.

(Copy of contract hereto attached and marked Exhibit C here shown to witness and identified by him as the one furnished by him to the company.)

That he did not disclose to the defendant after such conveyance was made that one of the houses had been conveyed to his wife.

74 Said copy of contract above referred to is in the words and figures following, to wit:

EXHIBIT C.

(Copy.)

Articles of agreemen made this the first day of November, in the

year of our Lord one thousand eight hundred & sixty-nine, between Daniel K. Pearsons, of Cook County, Illinois, and Sidney W. Sea, of county and State aforesaid, witnesseth: That if the said party of the second part shall first make the payment and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part in fee-simple, clear of all incumbrances whatever, by a good and sufficient warranty-deed, the following lots, pieces, or parcels of land, viz: lots thirteen, "13," fourteen, "14," fifteen, sixteen, "16," seventeen, "17," in block nineteen, "19," Bushnell's addition to Chicago, Illinois; and the said party of the second part hereby covenants and agrees to pay the said party of the first part therefore the sum of forty thousand dollars, in the manner following: The sum of four thousand dollars annually on or before November fir s of each and every year, to wit, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, together with interest at the rate of eight per cent. per annum, payable semi-annually; and to further pay all taxes, assessments, or impositions that may be legally levied or imposed upon any or all of said lots, and will exhibit once a year, on demand of D. K. Pearsons, receipts of the proper persons to said party of the second part, showing payment thereof, until the indebtedness aforesaid shall be fully paid

75 And the said second party further covenants and agrees to keep all buildings that may at any time be in said premises insured in a good, substantial insurance company or companies in a sum not less than sixteen thousand dollars, and will assign, with proper consent of the insurers, the policy or policies of insurance to said first party.

It is further stipulated and agreed that said second party in making payment of said forty thousand dollars as aforesaid may apply such payment upon such portion of said premises as shall be represented by the pro-rata value of the same as hereinafter established and herein set forth, and upon the full payment for such portion of said premises as the same is hereinafter valued, said second party shall be entitled upon demand to a deed in fee-simple for such part of said premises for which such pro-rata sum has been paid in full. And it is further agreed that no default which may be made or forfeiture declared on this instrument shall deprive said second party, his heirs or assigns, of the right to receive such a deed for such a portion of said property as shall be represented by any payment or payments that have so been made as aforesaid, and for which no equivalent deed had already been given.

And it is further stipulated and agreed that in the payment for a part of said premises, with a demand for a deed for the same, said premises shall be paid for and valued as follows, to wit: lot "13," thirteen, at six thousand dollars; lot "14," fourteen, at six thousand dollars; house No. "140," on Elm street, with 18¾ feet ground fronting on said Elm

76 street by 72 feet back therefrom, being ground wherein same is situate, at five thousand dollars; house No. "138," with 18¾ feet ground fronting on said Elm street by 72 feet back therefrom, being land whereon same is situate, at four thousand dollars; house No. "136" and 18¾ feet fronting on said Elm street by 72 feet back therefrom, being the ground whereon said house is situate, at thirty-four hundred dollars; houses No. "134," "132," "130," "128," with 18¾ feet of ground fronting on Elm street by 72 feet back therefrom, with each one being the ground whereon the same are respectively situate, at thirty-one hundred dollars each; house No. "126," with 18¾ feet fronting on Elm street by

72 feet back therefrom, at thirty-two hundred dollars; and in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, or to keep said buildings insured as aforesaid, this contract and all liability thereunder shall be forfeited and determined at the election of said parties of the first part. It being, however, mutually agreed by and between the parties hereto that said second party shall have sixty days' grace after any default and before a forfeiture can be declared upon this contract. In case this contract shall be forfeited as aforesaid, the said second party shall forfeit all or any payments made by him in this contract, if such amount so paid shall be insufficient to pay for in full any part of said premises aforesaid as the same are appraised, and such payment shall be
77 retained by the said party of the first part in full satisfaction and liquidation of all damages by them sustained, and he shall have the right to re-enter and take possession.

It is mutually agreed that the time of payment (due reference being had to the sixty days' grace aforesaid) shall be an essential part of this contract, and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties. Witness our hands and seals the day and year first above mentioned.

DANIEL K. PEARSONS. [SEAL.]
SIDNEY W. SEA. [SEAL.]

[Int. rev. stamp.]

This day appeared before me, Geo. P. Burrall, notary public for Calhoun County, Mich., Sidney W. Sea, who under oath says the above is a true copy of a contract made between himself and Daniel K. Pearsons, and refers to a proof furnished for loss under policy No. 7907 to said Sidney W. Sea by Springfield Fire & Marine Insu. Co.

SIDNEY W. SEA.

Battle Creek, Mich., December 14, '71.

GEO. W. BURRALL,
Notary Pub. for Calhoun Co., Mich.

Received at Springfield Dec. 18, 1871.

S. J. HALL, *Sec'y.*

DANIEL K. PEARSONS, a witness called on behalf of the plaintiff, testified upon direct examination as follows: That the policy upon
78 which this suit was brought was in his possession at the time of the fire; that it was delivered to him from Mr. Moore; that the houses insured were frame, brick basement, finished off in nice order, two stories, with nine or ten rooms in each tenement; that the average rental value was six hundred dollars for each house; that the houses were eighteen feet and nine inches wide and about forty-six feet deep each; that they had three large rooms on the first floor and were all completely finished.

Q. State if you had any conversation with the adjuster of the defendant in regard to the value; if so, what?

(Objected to because anything said by the adjuster as to the value would not be evidence against the company, and the company could not be held to have waived the question of value by anything said by the adjuster.

Objection overruled, there being no question made as to the agency of the adjuster, and exception taken by defendant's counsel.)

A. I did. He said it was no matter about appraising; he was satisfied of the value of the buildings; there was no need of any appraisal being made. The adjuster had the proofs of loss before him at that time; the proofs were furnished at that time.

Upon cross-examination the witness testified as follows:

79 That the witness did not state to J. N. Dunham, defendant's adjuster, that Sea had no interest in the property insured; that he (witness) has no interest in the property insured, except as to the unpaid balance upon the contract; that everything due upon the contract has been paid.

Upon redirect examination the witness said: That he was entitled to the insurance money upon the property in suit.

Upon re-cross-examination the witness said: That the indorsement upon the contract between himself and the plaintiff, showing the conveyance of one of the houses to Mary W. Sea, was made November 21st, 1870, by his clerk, when in fact the conveyance was made.

JAMES H. MOORE, a witness called on behalf of the defendant, testified upon direct examination as follows: That he is one of the firm of S. M. Moore & Company, insurance agents. At the time the policy in suit was issued they represented six or eight companies, the defendant company as one.

Q. State whether you ever had any knowledge whatever with reference to the contract of this property insured.

(Objected to by plaintiff's counsel.)

80 By the Court. That may come in for whatever it amounts to.

A. I do not positively recollect any conversation with Sea in regard to the title of the property. I remember of Mr. Sea having a written contract, and my impression is that I signed the written contract myself, (meaning the written contract given by Cornell to Sea.)

Q. Have you any recollection of anything that was said about the title at that time?

A. No, sir; not in regard to the title.

Q. Was there anything said?

A. There may have been something said about the title, and probably was, from the fact that it is made payable to Pearsons, but what the nature of that was I cannot state positively.

Q. Have you any custom in the conduct of your business about the issuing of policies, that is, with reference to the title of property insured; and, if so, what?

(Objected to by plaintiff's counsel; objection overruled.)

A. Our practice has always been, where parties refer the question of title to me, to tell them that the insurance should invariably follow the title; that the party owning the property is the proper party to insure it; if the property is mortgaged, the insurance may be assigned to the mortgagee to secure him.

81 Q. This is your invariable custom, is it?

A. Yes; where the question is referred to me.

Witness further testified that Cornell was a solicitor for his (witness's) firm, soliciting insurance for them on the street, and was also employed in writing at the office a part of the time; that he was first employed by them as a clerk and afterwards as a solicitor, and that he was paid by them first a salary and afterwards a salary and part commission, and afterwards entirely commission.

Q. Was he paid by you, or paid by the companies you represented?

A. By us.

Q. Was he known at all to the companies you represented?
A. No, sir; we employed all the agents.
Cross-examination waived.

J. N. DUNHAM, a witness called by defendant, upon direct examination testified as follows:

Am the adjuster for the defendant company; have been in the insurance business ten years; was at one time secretary of this company, sometimes been its general agent; was at one time secretary of the Western Massachusetts Insurance Company—ten years ago.

Q. I wish to ask you whether in your opinion the fact that the title of the plaintiff in this case was an equitable title held upon contract
82 instead of an absolute title was material to the risk?

(Objected to by plaintiff's counsel that it was a question of law.)

By the Court. Of course, in one sense it was material. The court will decide it was material.

Q. You can state whether at the time that Pearsons first called upon you he had any conversation with reference to Sea's title; and, if so, what.

A. Pearsons called upon me a few days after I arrived in Chicago, at the office I occupied, brought in a policy of insurance, and I think he then called for a blank to make out proofs of loss. I had no memorandum of this loss on my memorandum-book. He showed me the policy and I saw it was issued to Sidney W. Sea and payable, in case of loss, to Pearsons. I informed Mr. Pearsons that Mr. Sea was the person to make out the proof of loss. Mr. Pearsons said that Mr. Sea had nothing to do with it and no interest in it, and argued the matter with me that he was the person to make out the proofs of loss. I adhered to my first decision, and he said it was putting him to a great deal of trouble, because Sea was in Michigan, and he should have to send the papers to
83 him to get him to make them out.

Cross-examination waived.

The defendant here offered in evidence the copy of the contract between the plaintiff & Pearsons, sent to the defendant, which was the same as that offered by the plaintiff, except it did not contain the copy of the memorandum made and endorsed on the contract by Pearsons' clerk. The plaintiff stated in his testimony that he thought there was no use of copying that, that he just copied the body of the contract.

And the foregoing was all of the evidence introduced by either party upon said trial; and because none of said matters otherwise appear, it is prayed that this the defendant's exceptions might be signed, sealed, and made a part of the record, and the same are accordingly allowed.

There was no point made on the trial that there was other insurance on the property in another company, but these objections were made by the defendant's counsel to a finding of the issues for the plaintiff, viz:

1st. That the plaintiff's title was a conditional or equitable title, and not an absolute one, at the time the policy was issued, and that there was such a concealment of the kind of title he possessed as to vitiate the policy.

2d. That the conveyance of one of the houses and lots to Mrs. Sea, after the making of the policy and before the loss, without the consent or knowledge of the defendant, vitiated the whole policy.

84 3d. That in the proofs the plaintiff had stated falsely that the property was his, when in fact one of the houses & lots belonged to his wife, & thereby the policy was rendered void. And the defend-

ant claimed as evidence of the fraud that the plaintiff in sending a copy of the contract to the defendant had omitted from the copy sent the indorsement or memorandum on it showing that one lot had been transferred to Mrs. Sea.

4th. That immediately after the fire notice was not given as required by the policy of the loss to the defendant.

But the court held and decided that the plaintiff had an insurable interest in the property, notwithstanding he had not the absolute title, and that there was no such concealment of his actual interest or title as to vitiate the policy.

The court further held and decided that, however it might be as to the lot and building actually conveyed to Mrs. Sea, the fact of such conveyance did not render invalid the policy of insurance as to the other houses, though not communicated to the defendant.

The court further held and decided that it did not appear from the evidence that in his proofs of loss the plaintiff had wilfully or intentionally falsely stated the title or his interest in the property; that he might have regarded it all as his in one sense, though the title to one lot was in his wife.

The court further held and decided that the company had waived any right it might originally have had to insist upon the fact that notice in writing of loss was not immediately communicated to the company.

Exceptions allowed.

THOMAS DRUMMOND.

(Endorsed:) Filed July 12, 1872. W'm H. Bradley, cl'k.

85 On this day, to wit, the 23d day of July, A. D. 1872, the bond on appeal in said entitled cause was filed in said court with the clerk thereof, which said bond is in the words and figures following, to wit:

Appeal bond.

UNITED STATES OF AMERICA:

Supreme Court of the United States.

SPRINGFIELD FIRE AND MARINE INSURANCE Company *vs.* SIDNEY W. SEA, USE, ETC. } In error.

Know all men by these presents, that we, the Springfield Fire & Marine Insurance Company, a corporation established and existing under and by virtue of the laws of the State of Massachusetts, and Charles H. Case and James H. Moore, both of Chicago, Cook County, Illinois, are held and firmly bound unto Sidney W. Sea in the sum of ten thousand dollars, to be paid to the said Sidney W. Sea, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly, severally, firmly, by these presents. In witness whereof the said Springfield Fire & Marine Insurance Company has caused these presents to be signed by E. Freeman, its president, and the same to be attested and its corporate seal to be attached by S. J. Hall, its secretary, and the said Charles H. Case & Jas. H. Moore have signed and sealed the same this sixteenth day of

86 July, A. D. 1872.

The condition of this obligation is such, that whereas the above-named Springfield Fire & Marine Insurance Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action in favor of the said Sidney W. Sea by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Springfield Fire & Marine Insurance Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

[CORPORATE SEAL.] L. FREEMAN, *President.*

Attest:

SANFORD J. HALL, *Sec'y.*

CHA'S H. CASE. [SEAL.]
JAMES H. MOORE. [SEAL.]

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed July 23d, 1872. W'm H. Bradley, cl'k.

87 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said Sidney Sea, for the use of Daniel K. Pearsons, is plaintiff, and the said The Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, is defendant, as appears from the original of the same remaining of record in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Chicago in said district, this tenth day of August, A. D. eighteen hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL.] W'M H. BRADLEY,
Clerk.

88 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you between Sidney W. Sea, for the use of Daniel K. Pearson, plaintiff, and The Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, defendant, a manifest error hath happened, to the great damage of the said The Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

89 United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twentieth day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

89½ (Indorsed:) Circuit court of the United States, northern district of Illinois. Sidney W. Sea, use of Daniel K. Pearson, vs. The Springfield Fire & Marine Insurance Co., of Springfield, Mass. Writ of error.

90 UNITED STATES OF AMERICA, *ss:*

To Sidney W. Sea, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The Springfield Fire & Marine Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Chicago, in the northern district of Illinois, in the seventh judicial circuit, this 28th day of October, A. D. 1872.

THOMAS DRUMMOND.

Service accepted by copy this 28th day of October, A. D. 1872.
SPAFFORD, McDAID & WILSON,
Attorneys for Sidney W. Sea.

(Indorsed:) Supreme Court of the United States. Springfield Fire & Marine Ins. Co. vs. Sidney W. Sea, use, &c. Citation. Grant & Swift, Chicago, Ill., att'ys for pl'ff in error.

91 UNITED STATES OF AMERICA:

Supreme Court of the United States of December term, in the year of our Lord eighteen hundred and seventy-two.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY *vs.* SIDNEY W. SEA, USE, ETC. } In error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Springfield Fire & Marine Insurance Company by Grant & Swift, its attorneys, and says

that in the record and proceedings aforesaid there is manifest error in this, to wit, that the declaration aforesaid and the matter therein contained are not sufficient in law for the said Sidney W. Sea to have or maintain his aforesaid action thereof against the said Springfield
92 Fire & Marine Insurance Company; there is also error in this, to wit, that by the record aforesaid it appears that—

1. The court admitted improper evidence on behalf of the said Sidney W. Sea, plaintiff, in the court below.

2. The finding of the court for the said Sidney W. Sea, plaintiff, in the court below is against the evidence in the case.

3. The judgment aforesaid given was given for the said Sidney W. Sea against the said Springfield Fire & Marine Insurance Company, whereas according to the law the said judgment ought to have been given for the said Springfield Fire & Marine Insurance Company against the said Sidney W. Sea; and the said Springfield Fire & Marine Insurance Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing; and that it may be restored to all things which it hath lost by occasion of said judgment, &c.

GRANT & SWIFT,
Att'ys for Pl'ff in Error.

93 And now comes the said Sidney W. Sea, the defendant in error, by Horatio G. Spafford, his attorney, and says that there is no error in the record and proceedings aforesaid, as alleged by said plaintiff in error, and prays that the judgment rendered in said cause may be affirmed.

HORATIO G. SPAFFORD,
Att'y for Defendant in Error.

(Indorsed:) Supreme Court United States. Springfield F. & M. Ins. Co. vs. Sidney W. Sea. Assignment of error.

(Indorsement on cover:) No. 379. The Springfield Fire & Marine Insurance Company, of Massachusetts, plaintiff in error, vs. Sidney W. Sea, for the use of Daniel K. Pearson. N. Illinois C. C. U. S. Filed 21st December, 1872.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, OF SPRINGFIELD, MASSACHUSETTS,
Plaintiff in Error,

v.

SIDNEY W. SEA,
FOR THE USE OF DANIEL K. PEARSONS,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. H. SWIFT,
Attorney for Plaintiff in Error.

W. C. GRANT,
Of Counsel.

JAMESON & MORSE, Printers, 162 & 164 Clark St., Chicago.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, OF SPRINGFIELD, MASSACHUSETTS,
Plaintiff in Error,

v.

SIDNEY W. SEA,
FOR THE USE OF DANIEL K. PEARSONS,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

Upon the 15th day of March, 1872, defendant in error commenced suit against the plaintiff in error, in the Superior Court of Cook County, Illinois, to recover the amount of a policy of insurance issued by the plaintiff in error to the defendant in error upon the first day of May, A.D. 1870, for the term of three years, which policy contained the following language:

"By this policy of insurance, the Springfield Fire and Marine Insurance Company, of Springfield, Massachusetts, in consideration of one hundred and twenty dollars, to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Sidney W. Sea, Esq., against loss or damage by fire to the amount of eight thousand dollars, $1,000 on each of his eight two-story frame,

with brick basement dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138 and 140 Elm Street, between Clark and La-Salle streets, Chicago, Ills.

"Other insurance permitted without notice until required. Loss, if any, payable to D. K. Pearsons, as his interest may appear."

Upon the 28th day of April, A.D. 1872, said cause was, upon motion of plaintiff in error, transferred to the Circuit Court of the United States for the Northern District of Illinois, upon the 11th day of July, A.D. 1872, the cause was heard before Hon. Thomas Drummond, Judge of said Circuit Court, a jury having been waived, and the cause submitted to the court by written stipulation of the parties filed in said cause; and upon the 12th day of July, 1872, judgment was rendered against the plaintiff in error, for the sum of seven thousand dollars and costs, against which judgment the plaintiff in error duly sued out its writ of error.

At the time that defendant in error procured the insurance, he had no title to the buildings insured, except such as he had under an executory contract with Daniel K. Pearsons, on which contract nothing had then been paid. (Printed Record, page 27.)

Said contract is as follows:

"Articles of Agreement made this first day of November, in the year of our Lord one thousand eight hundred and sixty-nine, between Daniel K. Pearsons, of Cook county, Illinois, and Sidney W. Sea, of county and State aforesaid, witnesseth, that if the said party of the second part shall first make the payment and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed, the following lots, pieces, or parcels of land, viz: Lots thirteen, (13,) fourteen, (14,) fifteen, (15), sixteen, (16,) seventeen, (17,) in block nineteen, (19,) Bushnell's Addition to Chicago, Illinois; and the said party

of the second part hereby covenants and agrees to pay the said party of the first part therefore the sum of forty thousand dollars, in the manner following: the sum of four thousand dollars annually on or before November first of each and every year, to wit: 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, together with interest at the rate of eight per cent. per annum, payable semi-annually; and to further pay all taxes, assessments, or impositions that may be legally levied or imposed upon any or all of said lots, and will exhibit once a year on demand of D. K. Pearsons, receipts of the proper persons to said party of the second part, showing payment thereof until the indebtedness aforesaid shall be fully paid, and the said second party further covenants and agrees to keep all buildings that may at any time be on said premises, insured in a good and substantial insurance company or companies, in a sum not less than sixteen thousand dollars, and will assign with proper consent of the insurers, the policy or policies of insurance to said first party.

"It is further stipulated and agreed that the said second party, in making payment of said forty thousand dollars as aforesaid may apply such payment upon such portion of said premises as shall be represented by the *pro rata* value of the same as hereinafter established and herein set forth, and upon the full payment for such portion of said premises, as the same is hereinafter valued, said second party shall be entitled, upon demand, to a deed in fee simple for such part of said premises for which such *pro rata* sum has been paid in full. And it is further agreed that no default which may be made or forfeiture declared on this instrument shall deprive said second party, his heirs or assigns, of the right to receive such a deed for such a portion of said property as shall be represented by any payment or payments that have so been made as aforesaid, and for which no equivalent deed had already been given. And it is further stipulated and agreed that in a payment for a part of said premises, with a demand for a deed for the same, said premises shall be paid for and valued as follows, to-wit: Lot (13) thirteen, at six thousand dollars; lot (14) fourteen at six thousand dollars; house No. "140," on Elm street, with 18¼ feet ground fronting on said Elm street by 72 back therefrom, being ground whereon same is situate, at

five thousand dollars; house No. "138," with 18¾ feet ground fronting on said Elm street by 72 feet back therefrom, being land whereon same is situate, at four thousand dollars; house No. "136" and 18¾ feet fronting on said Elm street by 72 feet back therefrom, being the ground whereon said house is situate, at thirty-four hundred dollars; houses Nos. "134," "132," "130," "128," with 18¾ feet of ground fronting on Elm street by 72 feet back therefrom, with each one being the ground whereon the same are respectively situate, at thirty-one hundred dollars each; house No. "126," with 18¾ feet fronting on Elm street by 72 feet back therefrom, at thirty-two hundred dollars. And in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, or to keep said buildings insured as aforesaid, this contract and all liability thereunder shall be forfeited and determined, at the election of said party of the first part. It being however mutually agreed by and between the parties hereto, that said second party shall have sixty days grace after any default and before a forfeiture can be declared upon this contract. In case this contract shall be forfeited as aforesaid, the said second party shall forfeit all or any payments made by him in this contract, if such amount so paid shall be insufficient to pay for in full any part of said premises aforesaid as the same are appraised, and such payment shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by them sustained, and he shall have the right to re-enter and take possession. It is mutually agreed that the time of payment (due reference being had to the sixty days of grace aforesaid), shall be an essential part of this contract and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

Witness our hands and seals the day and year first above mentioned.

[Signed.] DANIEL K. PEARSONS, [SEAL.]
SIDNEY W. SEA, [SEAL.]"

[INT. REV. STAMP.]

(Printed record, pages 27, 28 and 29.)

The following endorsements were subsequently made on said contract:

"Aug. 2, 1870. Rec. interest due May 1, 1870, $1,600."

"Nov. 21st, 1870. Recd. on within $4,000, & delivered deed to Mary W. Sea for house No. 138, & premises on which same is, &c."

"Dec. 8, 1870. Recd. this day $1600—sixteen hundred dollars, interest on within contract."

"June 29, '71. Recd. this day on within, $1,440, due May 1st, 1871, and interest on that sum since that date—$19—$1,459." (Printed record, page 29.)

The house described in the policy as No. 138 Elm street, was conveyed, November 21, 1870, to Mary W. Sea, wife of defendant in error, by Daniel K. Pearsons, the consideration being paid by defendant in error.

All of the houses insured were destroyed by the great fire in Chicago, October 8 and 9, 1871. At the time of the fire the defendant had no title to seven of the houses, save such as he had under said contract, and no title to the eighth, save such, if any, as he had under the said conveyance to his wife.

November 12, 1871, the defendant in error filed with plaintiff in error his proof of loss, which is as follows:

"No. of policy, 7,909; amount, $8,000. To the Springfield Fire and Marine Insurance Company, of Springfield, Mass.:

"By your policy of insurance, No. 7,909, dated April 30th, 1870, issued at your agency at Chicago, Illinois, and continued by renewal No. to the first day of May, 1873, you insured Sidney W. Sea, Esq., against loss and damage by fire to the amount of eight thousand dollars, according to the terms and conditions printed in said policy, the written portion being as follows, viz: Eight thousand dollars—$1,000 on each of his eight two-story frame, with brick basement, dwellings, situ-

ate and known as Nos. 126, 128, 130, 132, 134, 136, 138 and 140 Elm street, between Clark and LaSalle streets, Chicago, Ill. Other insurance permitted without notice, until required. Loss, if any, payable to D. K. Pearsons, as his interests may appear.

"Also, there was other insurance on said property to the amount of eight thousand ($8,000) dollars, and no more, as follows, full itemized copies of the written portion of which policies and endorsements are hereunto annexed; $1,000 on each of his eight two-story frame, with brick basement, dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138 and 140 Elm street, between Clark and LaSalle streets, Chicago. Illinois. Other insurance permitted without notice, until required. Loss, if any, payable to D. K. Pearsons, as his interest may appear.

"A fire occurred on the ninth day of October, A. D. 1871, at about the hour of 11 o'clock A. M., and originated as follows, viz: by reason of a general conflagration in the city of Chicago, commencing on October 8, 1871, and extending into the night of October 9, 1871.

"The actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of the loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made, was as follows, viz:

	Sound value.	Loss or damage on same	Insurance on same.
House No. 126 Elm st., Chicago, Ills.....	$2,500	$2,500	$1,000
House No. 128 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 130 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 132 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 134 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 136 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 138 Elm st., Chicago, Ills.....	2,500	2,500	1,000
House No. 140 Elm st., Chicago, Ills.....	2,500	2,500	1,000
Total sound value, total loss, and total insurance, ...	$20,000	$20,000	$8,000

"For a more particular statement of same, see Schedule A, annexed. Amount claimed of the Springfield Fire and Marine Insurance Company, $8,000.

"The property insured belonged exclusively to Sidney W. Sea, having purchased the same by contract from D. K. Pearsons, the interest of said Pearsons being the balance of the purchase money due on said premises, and no other person or persons had any interest therein.

"The building insured, or containing the property destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to-wit: W. M. Arnett occupied No. 140 Elm st.; Isaac P. Coates occupied No. 138 Elm st.; E. R. Hooper occupied 136 Elm st.; Geo. A. Shufeldt, Jr., occupied 134 Elm st.; Mrs. Cragin occupied 132 Elm st.; Rev. J. T. Westover occupied 130 Elm st.; J. M. Johnson occupied 128 Elm st.; Miss E. Herse occupied 126 Elm st.; all of whom were tenants of said S. W. Sea, and said buildings were all occupied as dwelling houses.

"The said fire did not originate by any act, design, or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him; that nothing has been done by or with his privity or consent to violate the conditions of the policy or render it void; and that no articles are mentioned herein but such as were in the building, damaged or destroyed, and belonging to and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said company as to the extent of said loss has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

"Witness my hand at Chicago, this 8th day of November, 1871.

SIDNEY W. SEA.

"STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

November 8th, 1871.

"Personally appeared, Sidney W. Sea, signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said company should be advised of, before me, a Notary Public in and for the City of Chicago, in said county and state.

JOHN C. BARKER,
Notary Public.

[NOTARIAL SEAL.]

"STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.
CITY OF CHICAGO. }

"I, John C. Barker, a Notary Public residing in said city, and in and for said city, in said county and state, residing most contiguous to the property of said Sidney W. Sea, insured as set forth in the preceding affidavit, certify that I am not concerned in that loss or claim, either as a creditor or otherwise, or related to the insured or sufferers, and that I am acquainted with the character and circumstances of said Sidney W. Sea, and having made diligent inquiry into the facts set forth in the foregoing statement, believe and know that said Sea really by misfortune, without fraud or evil practice, sustained by the described fire loss and damage to the amount of eight thousand dollars, the sum stated in his said affidavit of loss.

"In testimony whereof, I have hereunto set my hand and official seal, this eighth day of November, A. D. 1871.

[NOTARIAL SEAL.]

JOHN C. BARKER,
Notary Public.

SCHEDULE A.

"The property insured above named consisted of eight buildings or houses in one block, situated on the corner of Elm and North Clark streets, Chicago, Illinois. The buildings, known by the numbers here-

inbefore specified, were two stories, wooden buildings with brick basements, and fitted for and used as dwelling houses."

Upon the 18th of December, 1871, defendant in error furnished to plaintiff in error, at the request of plaintiff in error, a copy of the contract with Pearsons, which copy was verified by the oath of the defendant in error, and was like the copy hereinbefore shown in full, *except that it did not show any of the endorsements.* (Printed record, pages 30, 31 and 32.)

The Policy of Insurance contained the following provisions:

1. "If any person insuring any building or goods, in this office, shall make any misrepresentation or concealment," * * * * * * * * "such insurance shall be void and of no effect." (Printed record, page 17, first section of policy.)

2. "If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." (Printed record, page 18, third section of policy.)

3. "In case of any change of title in the property hereby insured, or if the premises insured shall be vacated and so remain for thirty days, without notice to this company, this policy shall cease and determine." (Printed record, page 18, fourth section of policy.)

4. "Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon thereafter as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit," etc. (Printed record, pages 18 and 19, ninth section of policy.)

5. "All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy." (Printed record, page 19, ninth section of policy.)

The defendant in error did not make known to the company at the time of procuring the insurance the true state of his title; did not disclose the fact that he had no title to the buildings insured, except under his executory contract with Pearsons.

The plaintiff in error claimed upon the trial—

First. That this rendered the policy void under the provisions of the policy noted above as "1" and "2."

The plaintiff in error also claimed upon the trial—

Second. That the conveyance of one of the houses insured to Mary W. Sea after the making of the policy and prior to the loss, vitiated the whole policy, under the provision of the policy noted above as "3."

This conveyance of one of the houses to Mary W. Sea was never disclosed by defendant in error to the plaintiff in error. (Printed record, page 30.)

The defendant in error made a proof of loss, claiming the insurance upon all the houses insured, although one of them had been conveyed, which proof of loss contained the following statement and was sworn to by him:

"The property insured belonged exclusively to Sidney W. Sea, having purchased the same by contract from D. K. Pearsons, the interest of said Pearsons being the balance of the purchase money due on said premises, and no other person or persons had any interest therein." (Printed record, page 25.)

At the request of the plaintiff in error, the defendant in error furnished to the plaintiff in error a copy of his contract with Pearsons, which defendant in error made oath was a true copy, but which did not show the endorsements that had been made upon the originals. (Printed record, pages 30, 31, and 32.) One of these endorsements

would have disclosed to the plaintiff in error the fact that one of the houses for which the defendant in error claimed the insurance had been conveyed to another person. (For endorsments on original contract, see printed record, page 29.)

The plaintiff in error claimed upon the trial—

Third. That these facts constituted such fraud and false swearing as to cause a forfeiture of all claims under the policy, because of that provision in the policy noted above as "5."

The plaintiff in error also claimed upon the trial—

Fourth. That the failure of defendant in error to give notice of his loss, as required by that provision of the policy noted above as "5," was a bar to any recovery.

The plaintiff in error also claimed—

Fifth. That the defendant in error could not, in any event, recover the insurance upon the house which had been transferred to Mary W. Sea before the loss, and the court so held, to which finding of the court, being to that extent in favor of the plaintiff in error, no error is alleged.

Upon each and all the other points made by the plaintiff in error upon the trial, the court decided against the plaintiff in error, holding:

"That the plaintiff had an insurable interest in the property, notwithstanding he had not the absolute title, and that there was no such concealment of his actual interest or title as to vitiate the policy." Also, "That however it might be as to the lot and building actually conveyed to Mrs. Sea, the fact of such conveyance did not render invalid the policy of insurance as to the other houses, though not communicated to the defendant." Also, "That it did not appear from the evidence that in his proofs of loss the plaintiff had wilfully or intentionally falsely stated the title or his interest in the property; that he might have re-

garded it all as his, in one sense, though the title to one lot was in his wife." Also, "That the company had waived any right it might originally have had to insist upon the fact that notice in writing of loss was not immediately communicated to the company;"

And rendered judgment against the plaintiff in error for seven thousand dollars and costs.

ERRORS ASSIGNED.

The plaintiff in error claims that the court erred in his ruling upon each and all of the first four points made upon the trial, and above stated:

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

I.

The interest of defendant in error in the premises insured was not an "*absolute*" *interest* at the time the insurance was procured, and *this fact was not represented to the company* and was not expressed in the policy.

That the interest was not an "*absolute interest*" is indisputable. The words "absolute interest" can mean nothing else than an interest or estate not subject to, or defeasible on, any condition, and the holder of an executory contract for the purchase of property, upon which contract nothing whatever has been paid, cannot, even by a stretch of imagination, be said to have such an interest.

Burrill's Law Dict., Vol. 1. Title, "Absolute" and "Absolute Estate."
Bouvier's Ditto, Vol. 1. Title, "Absolute."
Reynolds v. *The State Mutual Insurance Co.* 2 Grant's Cases, 326.

Indeed, the court below finds in effect that the assured had not an "absolute interest," as he finds "that the plaintiff had an insurable interest in the property, *notwithstanding he had not the absolute title.*" (Printed Record, page 35.)

That the defendant in error had an insurable interest in the property insured we do not and never have denied. That question is not presented by the case. That the plaintiff in error would have been willing to insure for something the interest which the defendant in error had, if it had been disclosed, is highly probable; but the question is, did they issue that policy believing the assured to have some interest in the property which he did not have, for which error the assured is responsible.

The court further finds "that there was no such concealment [by the defendant in error] of his actual interest or title as to vitiate the policy."

The court then finds, as matter of fact, that there was a concealment, and as matter of law that this concealment did not vitiate the policy. In saying, then, that the concealment was not such as to vitiate the policy, the court must mean either that the thing concealed was not material, or that the concealment was not made with intent to deceive or to commit a fraud.

But that the thing concealed—namely, the fact that the assured had only an executory contract for the property insured, upon which nothing had been paid—was material, is indisputable.

It was made material by the following provisions of the policy:

"If any person insuring any building or goods in this office shall make any misrepresentation or concealment" * * * "such insurance shall be void and of no effect." (Printed Record, page 17.)

"If the interest in property to be insured be a leasehold interest, *or other interest not absolute, it must be so represented to the company,*

and expressed in the policy in writing, otherwise the insurance shall be void." (Printed Record, page 18.)

It has been decided by this court to be material.

The Columbian Ins. Co. v. *Lawrence*, 2 Peters, 25.
Carpenter v. *The Washington Ins. Co.*, 16 *Peters*, 495.

See also:

Illinois Mutual Fire Ins. Co. v. *The Marseilles Manfg. Co.*, 1 Gilm., 236.
Reaper City Ins. Co. v. *Brennan*, 58 Ills., 158.
Reynolds v. *The State Mutual Fire Ins. Co.*, 2 Grant's Cases, (Pa.) 326.
Birmingham v. *Empire Ins. Co.*, 42 Barb., 457.
Flanders on Fire Ins., p. 292.

Moreover, the court below held upon the trial that this state of the assured's title was material to the risk. (Printed Record, page 34.)

And as matter of fact, it did not appear upon the trial that the interest of the assured in the property insured was worth at the time the policy was issued any more than the assured was by his contract bound to pay before he could get the absolute title. And it does appear that the assured was likely to be deprived, at any time, of all his interest in the premises insured, by failure to keep the covenants and make the payments provided for by his contract. (Printed Record, page 28.)

Had this state of things been disclosed to the plaintiff in error, is it probable that it would have insured the true interest of the defendant in error, in the sum of eight thousand dollars?

It seems so plain, therefore, that the state of the title of the assured was material, that we think the court, in using the language above cited, must have meant that the concealment was not made with intent to deceive or to commit a fraud.

But what the intent of the assured was, we think is of no consequence, if he did conceal or fail properly to represent to the company this state of his title.

Burritt v. *The Saratoga County Mutual Fire Ins. Co.*, 5 Hill, 188.

Carter v. *Boehm*, 1 Smith's Leading Cases, p. * 618.

See also same Vol. p. * 636, and cases there cited.

Davenport v. *The N. E. Mutual Fire Ins. Co.*, 6 Cush., 340.

In *Carter* vs. *Boehm*, Lord Mansfield says (p. *620): "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void."

But it may be argued that the court in finding "that there was no such concealment, [by the defendant in error,] of his actual interest or title as to vitiate the policy," did not intend to find as matter of fact that there had been any concealment whatever. If this were so, the court would undoubtedly have stated as his conclusion, either negatively, that there was no "concealment," or positively, that the state of the title was properly "represented to the company," and the conclusion of the finding as to the effect in vitiating the policy, would be unnecessary and, indeed, absurd. And if the fact of some concealment is found, then the only questions we can see are the materiality of the thing concealed and the intent, which questions we have already discussed.

But admitting for the sake of the argument that the court had squarely found that there was no concealment, and that the true state of the title was represented to the company, we then say:

II.

The facts established are not sufficient in law to charge the plaintiff in error with knowledge of the true state of the title of the assured. But few facts were at issue in the case. For this reason a jury was waived, and no question arose under the pleadings, a stipulation being made that all matters of defence might be introduced under the plea of general issue. (Printed Record, page 22.)

It was established upon the trial that the defendant in error procured this insurance at the same time with other insurance, through one Cornell, a solicitor or street-broker, who obtained from S. M. Moore & Co. a written agreement to furnish sixteen or twenty thousand dollars of insurance at a certain rate; that this insurance was furnished under that agreement; that this agreement specified the property but said nothing about the title; that the assured showed his contract with Pearsons to Cornell; that the assured told James H. Moore, of the firm of S. M. Moore & Co., that he had bought the property on long time, and was pretty heavily in debt. (Printed Record, pages 27, 29, and 30.)

It was also established that S. M. Moore & Co. were the only authorized agents of the plaintiff in error, (see policy, printed Record, page 20, and also see printed Record, page 33,) and that Cornell was a solicitor, soliciting insurance for them upon the street; that he was employed by them and paid by them, and was not known to the companies at all. (Printed Record, pages 33 and 34.)

It further appears that the policy contained this clause: "loss, if any, payable to D. K. Pearsons, as his interest may appear."

Are these facts sufficient to give the insurer knowledge of the true state of the title?

If the contract with Pearsons had been shown to one of the firm of S. M. Moore & Co., the only agents whom the Company recognized, the case would have been far different.

But Cornell, to whom the contract was shown, was a mere solicitor upon the street, and known to be only such to the assured. He had no power to make any contract for insurance. He made out the written agreement for this and other insurance, but took it to S. M. Moore & Co. to sign, and then carried it back to the defendant in error, who carried it to S. M. Moore & Co., when he wanted the insurance thus contracted for. (Printed Record, pages 27, 29, and 30.) The policy is countersigned by S. M. Moore & Co. as the authorized agents of the plaintiff in error. (Printed Record, page 20.) Did not these facts make known to the defendants in error that Cornell was merely an employee of S. M. Moore & Co., a drummer to solicit business for them, to whom no authority whatever was delegated, and who could not in any sense be deemed an agent of the insurance companies represented by his employers?

"An agent may employ a sub-agent, but cannot without the consent of his principal, delegate his authority and transfer his responsibility to another." But there can be no pretence here that S. M. Moore & Co. gave to Cornell any of the indicia of agency or enabled him to lead the most unwary to suppose that he was the representative of the insurance companies of which S. M. Moore & Co. were the local agents. On the contrary it appears that S. M. Moore & Co. retained all authority to make contracts of insurance, and that this must have been known to the defendant in error. Such being the facts and it also being the fact that Cornell was employed by S. M. Moore & Co., and was not known at all to the company, was there any such privity between him and the plaintiff in error as to make notice to the former notice to the latter?

A large part of the insurance business of the country is procured by such solicitors as Cornell; drummers, like hotel, railway, and steamboat drummers, and if it is held that notice to them is notice to the companies by whose agents they are employed, either the insurance business must be ruined or this method of procuring it must be abandoned.

Upon the effect of notice to a sub-agent who had no power to make a contract of insurance, see *Ayers* v. *The Home Ins. Co.*, 21 Iowa, 192, which holds that such notice is not notice to the company.

To the introduction of testimony as to anything done and said by, to and with Cornell, objection was made, and exception duly taken to the ruling of the court in admitting the same. (Printed Record, pages 27 and 29), but no argument is now made upon the same, simply because, if Cornell's relation to the company was such that notice to him was notice to the company, the exceptions could not be sustained, and if they were not such, as we think they were not, then the evidence is immaterial, and should have no weight in the decision of the case.

But further, is the fact that the assured told Moore that he had bought the property on long time, and was pretty heavily in debt, and the fact that the policy contained the clause "loss, if any, payable to D. K. Pearsons, as his interest may appear, sufficient to properly make known to the company the true state of the title of that applicant for insurance? Would the agents, from these statements, mistrust that the applicant held only a contract for the purchase of the premises which he wished insured, on which contract nothing had been paid? Would they be called upon, by these statements, to make any other inquiries than those called for by the terms of the policy, or would they be in any manner thus put upon inquiry? Would they not rather be warranted in inferring that the applicant held the absolute title to the premises to be insured, subject only to a mortgage to Pearsons?

The applicant stated that he had bought the property on long time, and was pretty heavily in debt. It is insured as *his* property, and the clause inserted in the policy is the usual clause for the benefit of the mortgagee. We do not say that this statement of the applicant was inconsistent with the truth, nor mean to allege that it was intended to deceive, but was it not well, though innocently, calculated to mislead the agents of the company as to the true state of the title, and prevent rather than awaken any disposition to inquiry? Do not these

statements leave something concealed from the company, or not properly represented to it, which something was very material to the risk?

Even then, if the court had squarely found that there was no concealment, and that the true state of the title was represented to the company (which is not the finding, as we understand it), we should say that the facts are not sufficient to warrant such a conclusion.

III.

The conveyance of one of the houses insured after the making of the policy and prior to the loss vitiated the whole policy.

The policy was issued April 30, 1870. (Printed Record, page 20.) November 21, 1870, one of the houses insured was conveyed by Pearsons to Mary W. Sea, wife of defendant in error. (Printed Record, pages 29 and 33.) The loss occurred Oct. 9, 1871. (Printed Record, page 26.)

The question is, did this conveyance render the whole policy void.

The provision of the policy is that in case of *any change* of title in the property insured, the policy shall cease and determine. (Printed Report, page 18.) There can be no serious question that the conveyance of one of the houses insured was such a change of title as to avoid the policy at least so far as the house conveyed is concerned. The fact that it was conveyed to the wife of the assured, instead of to a stranger, is surely immaterial. Except as against the creditors of the assured she holds as a stranger, and to the contract of insurance she is a stranger.

This policy does not provide, as many do, that a sale or transfer of the property insured shall avoid the policy, but uses the much more comprehensive language, "*any change of title*," and, as the Supreme

Court of Illinois has said in the case of *Dix et al.* v. *The Mercantile Ins. Co.*, cited below:

"We have no right to say, when it is agreed between them and the assured, that a transfer or change of title to the property, or to an undivided part of it, shall make the policy void, that they were stipulating against a transfer to strangers only. The terms used are too broad for that, and the object of the condition would be defeated by so restricting them."

It may be claimed that Mrs. Sea held in trust for her husband the house conveyed to her, but the testimony of the assured that it was held by her until he wished to improve it — conditionally—(printed Record, page 30)— is not sufficient to establish any trust. The assured could not state that the deed to his wife contained any declaration of trust in his favor. (Printed Record, page 30.) Moreover, whether there was any such trust would be a question of fact for the court to find (the case having been tried without a jury), and there is no such fact found.

The court below has passed upon this question, so far as the house conveyed is concerned, and has held that to that extent the policy was avoided, by rendering judgment for seven thousand dollars, the amount of insurance under the policy in suit upon the houses not conveyed, for no serious question was made that the loss was greater than the amount of all the insurance upon the buildings destroyed.

See, also,

Dix et al. v. *Mercantile Ins. Co.*, 22 Ill., 272.
Wilson v. *Hill*, 3 Met., 66.
Dreher et. al. v. *Ætna Ins. Co.*, 18 Mo., 128.

But the main question under this point, is whether the change of title as to one of the houses insured avoided the policy as to those to which the title had not been changed.

The property insured consisted of eight frame houses under one roof, in one block. (Printed Record, page 26, schedule A.) The premium was low. (Printed Record, page 27.)

The policy reads "in consideration of one hundred and twenty dollars" * * * * * "do insure Sidney M. Sea, Esq., against loss or damage by fire, to the amount of eight thousand dollars—$1,000 on each of his eight two-story frame, with brick basement, dwellings, situate and known as Nos. 126, 128, 130, 132, 134, 136, 138 and 140 Elm street, between Clark and La Salle streets, Chicago, Ill. Other insurance permitted without notice until required. Loss, if any, payable to D. K. Pearsons, as his interest may appear. 3 yrs, $8,000, @ 1.50, $120."

This change of title was never disclosed to the plaintiff in error. (Printed Record, page 30.)

The premium is one and indivisible, for though the risk was one thousand dollars on each house, and the rate for the whole insurance was one and one-half per cent., yet who can say that the exposure to fire was equal for each house, and that the company would just as readily have written eight different policies, one upon each house, for one thousand dollars, for a premium of fifteen dollars?

Who can say how largely the fact that the title to the whole block was the same influenced the company in fixing the rate at which the risk was taken? If the change of title of any one house only avoids the policy as to that house, then one of those houses, in the centre of this frame block, transferred and changed in its use, might change the whole risk from very safe to extra hazardous.

But the question is purely one of construction. Is this contract of insurance an entire or a divisible contract? If the money to be paid in case of loss were not apportioned by the policy, the question could hardly arise. If the insurance was stated only as eight thousand dollars in gross, no one would for a moment suppose that any court would say, because there were eight buildings this insurance must be divided by eight, and this is eight contracts instead of one. But, merely because the money to be paid has been apportioned, shall the court say that the premium shall be apportioned; that the company made eight different contracts instead of one, and made each in consideration of fifteen dollars?

The highest courts of various states have held, with great unanimity, that contracts of this kind are entire. How desirable it is that the highest court of the land should fix the same rule, if consistent with law and justice, is too well understood by the tribunal to which our argument is addressed, to be urged.

In support of our position upon this point we refer to

Richardson v. *Maine Ins. Co.*, 46 Me., 394.
Day v. *Charter Oak F. & M. Ins. Co.*, 51 Me., 91.
Barnes v. *The Union Mutual Ins. Co.*, 51 Me., 110.
Brown v. *People's Mutual Ins. Co.*, 11 Cush., 280.
Friesmuth v. *Agawam Mu. Fire Ins. Co.*, 10 Cush., 587.
Lee v. *Howard Fire Ins. Co.*, 3 Gray, 583.
Kimball et al., v. *Same*, 8 Gray, 33.
Trs. Fire Ass., Phil., v. *Williamson*, 26 Pa. St., 196.
Gottsman v. *The Pa. Ins. Co.*, 56 Pa. St., 210.
Smith v. *Empire Ins. Co.*, 25 Barb. 497.
Whitwell v. *Putnam Fire Ins. Co.*, 6 Lansing, 166.
Ass. Fire Ins. Co., v. *Assum*, 5 Md., 165.

IV.

The assured was guilty of such fraud and false swearing in making his proof of loss as to prevent his recovering anything from the plaintiff in error.

The established facts upon this point are as follows:

The proof of loss rendered by the assured states that "the property insured belonged exclusively to Sidney W. Sea, having purchased the same by contract from D. K. Pearsons, the interest of said Pearsons being the balance of the purchase money due on said premises, *and no other person or persons had any interest therein.*"

To this proof of loss the defendant in error made oath, and also made oath "that no material fact is withheld that the said company should be advised of." (Printed record, page 25.)

Learning from this proof, for the first time, that the assured holds the property insured only under a contract from Pearsons, the company requests him to furnish a copy of this contract as part of his proof of loss (printed record, page 30), and he furnishes a copy, sworn by him to be a true copy (printed record, pages 30, 31 and 32), but which does not show the endorsements made upon the original, one of which is, "Nov. 21st, 1870—Rec'd. on within $4,000 & delivered deed to Mary W. Sea for house No. 138 and premises on which same is," &c. (Printed record, page 29.) The defendant in error testifies that he thought there was no use of copying that, that he just copied the body of the contract. (Printed record, page 34.)

The policy contains the following provision: "All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy."

Do these facts constitute fraud or false swearing within the meaning of that clause of the policy cited above?

It is true the defendant in error may have regarded the property all as his in one sense, though the title of one of the houses was in his wife; but he does not simply swear that the property is his—he swears that it belongs *exclusively* to him, and that *no other person has any interest in it*, and that in making the proof no material proof is withheld that the company should be advised of (printed record, page 25), and from the copy of the contract which he furnishes he leaves off the memorandum which would have disclosed the conveyance to his wife; and putting all these things together, can there be any doubt that he understood that the conveyance of one of the houses to his wife was a material fact, and that if he disclosed the same to the company it would certainly prejudice his claim to one thousand of the eight thousand dollars insurance which he claimed?

A man should be held to intend the natural consequence of his acts, and the natural consequence of this false swearing was that the company should be deceived as to the extent and validity of the claim of the assured.

If this was the intention of the assured, then his false swearing was willful and intentional.

Is it possible that the assured could have made the statements contained in his proof through any mistake, or inadvertence, or thoughtlessness, or have omitted to state the conveyance to his wife from other than deliberate purpose? The defendant in error did not upon the trial undertake in any manner to explain the statements he had made in his proof, and, in view of all the circumstances, the fact that the Court rendered judgment for seven thousand dollars instead of for the full amount of the claim, is equivalent to a verdict that there was fraud and false swearing.

Levy v. *Baillie et al.*, 7 Bing., 349.

V.

The assured did not give notice of his loss in writing forthwith, as required by the terms of the policy. (Printed record, pages 18 and 19.)

That this is a condition which must be complied with before any recovery can be had is indisputable, and the assured must prove that he has complied with it. No claim was made upon the trial that any such notice had been given, nor do the facts shown amount in law to a waiver by the company of such notice.

The proofs of loss were made November 8, 1871, one month after the fire, and this was the first notice in writing which the company had. This was not compliance with the requirements of the policy.

Track v. *State F. and M. Ins. Co.*, 29 Pa. St., 198.
Whitehurst v. *N. C. Mu. Ins. Co.*, 7 Jones Law, (N. C.,) 433.
Patrick v. *Farmers' Ins. Co.*, 43 N. H., 621.

The receipt of the proofs of loss by the company is no waiver of that provision of the policy which calls for notice in writing forthwith. Receiving proofs of loss without making any objection to their form may be a waiver of any defects in that form, but it was not necessary for the company, when receiving the proofs furnished in accordance with one requirement of the policy, to state that some other requirement of the policy had not been complied with.

Whitehurst v. *N. C. Mu. Ins, Co.*. 7 Jones Law, (N. C.,) 433.
Patrick v. *Farmers' Ins. Co.*, 43 N. H. 621.

It is true Pearsons gave verbal notice of this loss to the adjuster of the company, soon after his arrival in Chicago, but this was not sufficient. Pearsons was interested in the proceeds of the policy, but it was the interest of Sea that was insured.

Ayres v. *Hartford Ins. Co.*, 17 Iowa, 176.

All the facts which could be relied upon as constituting a waiver by the company are shown in the record (printed record, page 34), and we submit that they do not, in law, amount to a waiver.

Upon the trial of this cause other questions were raised, and various exceptions saved, which we do not now present, as we believe we have discovered the material issues.

In making up the bill of exceptions, some evidence was presented bearing upon such other questions, which may not be deemed necessary to a proper presentation of the issues we have discussed, but inasmuch as the record is brief and contains but little irrelevant matter, we trust we shall be pardoned if we have thus unduly taxed the patience of the court.

Respectfully submitted.

W. H. SWIFT,
Attorney for Plaintiff in Error.

W. C. GRANT,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 99.—October Term, 1874.

The Springfield Fire and Marine Insurance Company of Massachusetts, Plaintiff in Error,

vs.

Sidney W. Sea, for the use of Daniel K. Pearsons.

Brief for Defendant in Error.

This is an action on a policy of insurance issued by the plaintiff in error, by which it insured certain dwelling houses in Chicago, against loss and damage by fire. The following points are insisted upon in behalf of the defendant in error:

I.

At the trial of the cause in the circuit court, a stipulation by counsel was filed with the clerk of the court waiving a jury, and the issues of fact were tried and determined by the court without the intervention of a jury. The issues were found in favor of the plaintiff below, and a judgment for $7,000 was rendered for him, and against the insurance company.

The record contains a bill of exceptions, embracing "all the evidence given by either party," consisting of examinations and cross-examinations of witnesses in full, affidavits, and contracts. It discloses the fact that three exceptions were taken to the rulings of the court during the progress of the trial, on the admissibility of evidence, which were—

1. As to the competency of the plaintiff below to testify touching the value of the property destroyed by fire. Record, 26.

2. To the competency of conversations with one Cornell.

Record, 29.

3. To the competency of conversations with the adjuster of losses of the company, concerning the value of said property.

Record, 32.

There is no special finding of facts in the case, and it is submitted that the bill of exceptions, containing all the evidence, cannot be treated as a special verdict, and that the appellate court will not discharge the functions of a jury by making comparisons and weighing evidence.

Norris vs. Jackson, 9 Wall., 125.

Flanders vs. Tweed, 9 Wall., 425.

Burr vs. Des Moines Co., 1 Wall., 102.

The findings of the judge trying the cause, as shown in the record, are equivalent to a general verdict in favor of the plaintiff below, and such findings, therefore, cannot be reviewed here under the act of March 3, 1865.

The exceptions taken in the course of the trial cannot be sustained. The answer to the first one is that the witness had already answered a similar question, and had, also, shown himself fully competent to judge as to the value of the property in question. The answer to the second exception is that the previous testimony established the agency of the witness Cornell. And the answer to the third is that the question was a perfectly proper one. It is the especial business of an adjuster of losses for an insurance company, to understand the value of property.

II.

The policy of insurance on which this action was brought, bears date Chicago, Ill., April 30, 1870. The plaintiff in error thereby insured the defendant in error against loss or damage by fire to the amount of eight thousand dollars on each of eight two-story frame build-

ings in said city, for three years, for the consideration of one hundred and twenty dollars. By the terms of the policy, the loss, if any, was made payable to D. K. Pearsons, as his interest might appear. The policy was issued by the plaintiff in error, through its agents in Chicago, S. M. Moore & Co., and was countersigned by said firm.

On the first day of November, 1869, Sea, the defendant in error, purchased the premises so insured from the said D. K. Pearsons, for the sum of $40,000, to be paid in yearly installments of $4,000 each, the first payment to be made on the first day of November, 1870. The vendee was to pay interest semi-annually, at the rate of eight per centum per annum, and all taxes and assessments.

The agreement was a sealed instrument, and contained the following covenant on the part of Sea: "The said second party further covenants and agrees to keep all buildings that may at any time be on said premises insured in a good substantial insurance company or companies, in a sum not less than sixteen thousand dollars, and will assign, with proper consent of the insurers, the policy or policies of insurance to said first party."

In the winter of 1869 and 1870, the defendant in error entered into a written agreement with Moore & Co., a firm of insurance agents in Chicago, which firm was the agents of the plaintiff in error, by which said firm agreed to furnish Sea with sixteen or twenty thousand dollars insurance on the property in question, whenever he should require it.—(pp. 27, 29, 30.) One Cornell, who was the clerk and solicitor of insurance on the street for the said firm of Moore & Co., transacted this business with Sea. Cornell had been procuring Sea's insurance for him, for several months before this transaction, and was accustomed to take money from Sea for Moore & Co., and to bring back policies for them. And he took the said agreement to Moore & Co. and brought it back signed by said firm, and delivered it to Sea. At the time the agreement was made, Sea exhibited the contract between himself

and Pearsons, of November 1, 1869, to Cornell, and explained to him the condition of the property.

The policy in question was issued to Sea by Moore & Co., in pursuance of said agreement of the previous winter, and, at the time when it was issued, defendant in error had a conversation with a member of said firm about the business, and told him he had bought the property on long time, and the amount he was then in debt for it, and that the said insurance was for security for such indebtedness. He also directed that the policy should be sent directly to Pearsons, which was accordingly done.

pp. 27, 32, 33.

The said policy contained the following conditions, (p. 17,) to wit:

"If any person insuring any building or goods in this office shall make any misrepresentation or concealment, * * * such insurance shall be void."

"If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void."

"In case of any change of title in the property hereby insured, * * * this policy shall cease and determine."

"Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit." * * * "All fraud and false-swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on the policy."

"Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, without any deduction whatever."

On the 21st of November, 1870, one of the houses insured was conveyed by Pearsons to Mary W. Sea, wife of the defendant in error, all the purchase money therefor having been paid by Sea. The property so conveyed to the wife, was to be held by her conditionally until the

husband should be ready to improve it. Of this conveyance, the plaintiff in error had no notice.

The defendant in error, at the time of the purchase from Pearsons, took possession of the property, and was still in possession when the buildings were destroyed.

On the 8th and 9th days of October, 1871, a great part of the city of Chicago, including the premises covered by this policy, was destroyed by fire.

The agreement with Moore & Co. for insurance, and the deed from Pearsons to Mary W. Sea were destroyed by the fire.

Up to the time of the fire, Sea had fulfilled his obligations under the contract, and at the time of the trial still held the premises under it.

(p. 30.)

At the time of the fire, the defendant in error being in the State of Michigan, Pearsons, who was the beneficiary and in possession of the policy, (pp. 32, 33,) proposed to the adjuster of the company that he would furnish the proofs of loss in accordance with the policy; but the said adjuster would not permit him to do so, and required that such proofs should be made out by Sea. Therefore, the defendant in error afterwards, and on or about the 8th day of November, 1871, prepared the proofs of loss, and forwarded them to the plaintiff in error. No objection was taken to the proofs; but the company called on Sea for a copy of the contract between him and Pearsons. A sworn copy of said contract was furnished, but the endorsements thereon, one of which showed the conveyance to Mrs. Sea, were not given, because the defendant in error considered it unnecessary to copy the endorsements. This copy was sworn to at Battle Creek, Michigan, on the 14th day of December, 1871.

(p. 32.)

In the proofs of loss furnished by Sea, there is an allegation sworn to by him, that "the property insured belonged exclusively to Sidney W. Sea, having purchased

the same by contract from D. K. Pearsons, the interest of said Pearsons being the balance of the purchase money due on said premises, and no other person or persons had any interest therein."

First. The language of the policy requiring a disclosure of the interest of the property, is not entirely clear. It is easy enough to determine what an "absolute title" is, but what an "absolute interest" may be is a very different question. If the assured have an equitable interest only, it may nevertheless be fairly said that he has an absolute interest. But whatever this language may mean, the assured fully complied with the terms of the policy. He exhibited his contract with Pearsons, to Moore & Co., before the policy was issued, and he explained to them that he had bought the property from Pearsons, and told them how much he still owed for it, and that the insurance was to secure Pearsons; and all this was expressed in the usual way in the policy. The loss, if any, is made payable to Pearsons, as his interest may appear. If this is not a sufficient *expression* of the nature of the interest of Sea, the fault lies with the company. Its agents wrote the policy, and had full knowledge of all the facts, and cannot now take advantage of their own fault or omission to work injury to the assured.

Second. The fact that one of the houses was conveyed to Mrs. Sea, does not vitiate the policy as to the other houses insured. The houses were separately insured, and the amount of insurance on each was specified in the policy.

Clark vs. New Eng. Mar. Fire Ins. Co., 6 Cush., 342.

Com. Ins. Co. vs. Spankneble, 52 Ill., 59.

Third. The allegation of the assured in his proof of loss, that the property destroyed "belonged exclusively" to him, and that no other person "had any interest therein," was neither fraud or false swearing.

The agreement between Pearsons and Sea was well known to the company. The installments of purchase-money was expected to be paid yearly, and when the payments should amount to sufficient, Sea would be entitled to a fee simple title to as many houses as his payments would cover. The policy, by its own language, leaves the question of Pearsons' interest open for future inquiry, in view of these expected payments. The language is, "as his interest *may* appear."

If the conveyance had been to Sea, instead of to his wife, the change of title would have been just such a change as is contemplated by the terms of the policy and by the parties. If the insurance had been on a retail stock of merchandise, the fact that a part of the stock was sold, would be of no consequence. This case falls within the principle declared in *West Branch Ins. Co. vs. Hilfenstein*, 4 Wr., 289; See *Flanders on Ins.*, 423.

If we are correct in this view, then the conveyance to Mrs. Sea did not change the interest. Sea paid all the purchase-money, and the deed to Mrs. Sea gave her a mere paper title, to be held in trust for the benefit of her husband. And although this deed to her may have been absolute on its face, it was properly shown on the trial, by parol, that it was a mere nominal or trust deed. It worked no change whatever in the interest on which the policy was based.

Flanders on Fire Ins., 417.
Ayers vs. The Hartford Ins. Co., 21 Iowa, 193.
Ætna Fire Ins. Co. vs. Tyler, 16 Wend., 385.

Sea was, therefore, correct in swearing that the property belonged exclusively to him. But if he was in error as to the law, or even the fact, unless he acted in bad faith and knew his assertion to be false, such errors do not constitute a bar to his action.

Taney's Circuit Court Decisions, 173.

Fourth. The plaintiff in error waived its right to the notice of loss, required by the policy.

The agents of plaintiff in error were present on the ground. Pearsons, the beneficiary under the policy and in this suit, presented himself to the adjuster of losses of the company, with the policy in his hand, and proposed to furnish, then and there, the proofs of loss, and we are bound to presume, was ready and willing fully to comply, on his part, with the requirements of the policy. The adjuster refused to recognize him under the policy, and required that the proofs should be made by Sea, who was absent in a neighboring State. Pearsons was the owner of the policy and was the proper person to make out the proofs.—(*Cornell vs. Le Roy*, 9 Wend., 163.) In due course of time, the proofs of loss were made by Sea and presented. No objection whatever was made to the sufficiency of the proofs, except to call for the Pearsons contract. If additional notice of loss was required, it was the duty of the company's agents to call for it. By neglecting to call therefor, the right to insist upon it was waived.

The fact that the company refused to recognize Pearsons' rights under the policy, and required the action of Sea, who was absent in Michigan, enlarged the time for giving the notice and making the proofs of loss. The documents furnished by Sea contain full notice and also particulars of loss, and were presented within a reasonable time. And the company, by its course of proceeding, waived all other notice and proof of loss.

Clark vs. New Eng. Fire Ins. Co., 6 Cush., 345.
Vos vs. Robinson, 9 John., 192.
McMaster vs. Ins. Co., 25 Wend., 379.
Cornell vs. Le Roy, 9 Wend., 163.
Betts vs. Ins. Co., Taney's Dec., 172.

S. V. NILES,
ENOCH TOTTEN,
Counsel for Defendant in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1874.

THE SPRINGFIELD FIRE AND MARINE INSURANCE CO.,
Plaintiff in Error.

—*vs.*—

SIDNEY W. SEA, use, &c.
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT

FOR DEFENDANT IN ERROR.

H. G. SPAFFORD, Attorney for Defendant in Error.

CHICAGO:
Beach, Barnard & Co., Legal Printers, 98 Randolph Street.
1874.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1874.

THE SPRINGFIELD FIRE AND MARINE INSURANCE CO.,
Plaintiff in Error.

—*vs.*—

SIDNEY W. SEA, use, &c.
Defendant in Error.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT

FOR DEFENDANT IN ERROR.

This was an action brought by Sidney W. Sea, against the plaintiff, to recover for a loss sustained under a policy of insurance, set forth in the record, whereby the plaintiff in error insured, for the term of three years from May 1st, 1870, houses Nos. 126, 128, 130, 132, 134, 136 138, and 140, Elm street, Chicago, for $1,000 each.

The insurance was several as to each of the houses.

By the great fire of October, 1871, these houses were totally destroyed by fire, without fault of Mr. Sea. Proofs of loss were made shortly after the fire, and were not objected to. The adjuster of the company, who was admitted on the trial below to be a duly accredited agent of the company, stated that he was satisfied with the value of the buildings, and that there was no need of any appraisal

being made; that at that time the adjuster had the proofs of loss before him; that this adjuster was made acquainted with the fact of the loss shortly after the fire. (Printed Record, page 33.)

The Company made no objection, at any time, to the proofs of loss; but after the time appointed for payment in the policy, refused to pay the loss, and suit was therefore brought against the company.

On the trial before the Hon. THOMAS DRUMMOND, a jury being waived, the plaintiffs showed proof of loss, &c., policy of insurance, and showed the value of the buildings, upon which there was no question made.

The defendant endeavored to defeat the action by alleging that the plaintiff did not have an absolute title to the property insured, and that there was a change of title to the property; also alleged that there was fraudulent concealment.

The evidence of the plaintiff was, that *he ordered the insurance, and an agent of Moore*, the local agent at Chicago, came to him, and then went to Moore and got a written agreement for insurance and gave it to him; that he showed Cornell the agreement between Pearson and himself relating to the title. (Printed Record, p. 29.)

Plaintiff told Moore, the agent, that he had bought the property on long time, and was pretty heavily in debt, and told him how much he was in debt on it, and that this insurance was to go for security on the indebtedness. That the policy was written up, and, in accordance with instructions, the clause was written therein, "Loss, if any, "payable to D. K. Pearson, as his interest may appear," and the policy sent from the insurance office to Pearson's office. (Printed Rec., p. 27.)

That Moore the agent of the company, approved the

insurance, and made no objection whatever. (Printed Rec., p. 29).

J. H. Moore testified that something must have been said by Sea about the title, from the fact *that it was made payable to Pearson.* (Printed Rec., p. 33.)

It appeared that one of the houses upon which $1000 insurance rested, was conveyed by Pearson to Mrs. Sea, wife of plaintiff below, and which Sea states was to be held by his wife for him conditional till sale, &c. The building conveyed was No. 138 Elm street.

The court found that there was no fraudulent concealment, that Sea stated to the company that his title was not absolute upon obtaining insurance, and that by the sale of one house, the insurance on that house was not payable, and rendered a judgment for $7,000 for the loss on the other seven houses.

I.

1. It appears from the evidence in this case, as clearly as evidence can establish it, that this insurance was taken by this company after its agents knew that Sea had not the absolute title. Sea swears positively, that he showed his agreement with Pearson to Cornell, before taking the insurance, and it appears that Cornell went to Moore, the agent, and got a written agreement signed by Moore, and brought it to Sea.

That subsequently Sea told Moore that he had bought the *property on long time*, that he was heavily indebted on the property, and wished the insurance made payable to Pearson. Moore appeared also to understand perfectly the arrangement made by Cornell, for he said the insurance was too low, but that they would take it and make the policy payable to Pearson. (Printed Rec., p. 27).

Moore made the policy and inserted the clause desired,

and sent it to Pearson, and he says that he cannot state whether anything was said about the title, but something must have been said about it, or he would not have made it payable to Pearson. (Printed Rec., p. 33.)

In the case of *Commercial Insurance Co.* v. *Spankneble*, 52 Ills., 54, where a precisely similar clause appeared in the policy as to the character of the title, the Supreme Court held that the insertion of a clause, "loss, if any, "payable to Elias Greenbaum, trustee, as his interest may "appear," was sufficient information that Greenbaum held a trust deed upon the property, and had an interest therein.

The rule stated in the above case with regard to cases of this kind, is the one most consistent with justice and fair dealing. I therefore submit to this court that the evidence clearly establishes that full information was given to this company, through its agents, of the condition of the title and supports the finding of the court below.

2. It would not be necessary to consider the question above stated under the *finding of the court*, because the court *finds, from* the evidence, substantially, that there is no concealment as to title, and this finding of the court as to what the evidence was, upon the trial below, will not be inquired into in this court.

Therefore, upon both the finding of the court below, and the evidence in the cause, no error can be perceived as to this point in the record.

II.

Another question presented is, whether the fact that one of these houses was transferred to Mrs. Sea, avoids the whole policy. The policy was several as to each of the eight houses, being for $1,000 on each house. On No. 138 Elm Street, the house transferred to Mrs. Sea, there was $1,000 insurance; it rested upon a distinct par-

cel of land, and, as to *this house*, the court found against the plaintiff below.

There can be no question whatever made as to the judgment of the court against the company for the seven houses, to which the title was not changed in any manner. If the insurance had been undivided instead of in severality, then a different case might have been presented. As in the case cited by plaintiffs in error, from Illinois, viz, *Dix* v. *Mercantile Ins. Co.*, 22 Ills., 272, the transfer of an undivided portion of property would present a cause entirely different from this.

In this case, a separate piece of land with a separate house, was transferred, upon which rested a distinct and separate amount of insurance.

The effect of this policy is the same as if there had been eight distinct policies, one on each house for $1,000. The intention to insure each house separately, is made apparent by placing a separate risk on each house of $1,000, the fact that the premium is all paid at once in one sum, is not evidence that has any weight in construing the policy against the defendant in error.

There is nothing in the policy to indicate that this premium was considered as one and indivisible. It is simply a statement of the aggregate amount of the premium upon the eight houses.

In this case, the fact that this company placed $1,000 on each house, so that if one house was burned that loss would *relate to that house*, and only to the extent of $1,000, is conclusive as to the point that the contract was several.

The cases cited by the counsel for plaintiff in error, are not analogous we think to the case at bar, at least the authorities opposed thereto, are as numerous, and rest upon a sounder principle of law, as well as upon better reason. In most of the cases, the policy was avoided for

a misrepresentation of the title by the assured, at the time of procuring the insurance.

The cases that are directly in point, and which we submit are consonant with justice, hold that when there are several distinct subjects of insurance in one policy, that it amounts to a distinct contract of insurance as to each, and that if a change of title is made as to one subject, that it avoids the policy only as to that subject.

In the case of *Commercial Insurance Co.* v. *Spankneble*, 52 Ill., 59, where the language of the policy was stronger in terms in favor of the company viz., "and in case of any "sale, alienation, transfer, conveyance, or change of title, "&c., the insurance shall be void and cease, &c."

The court held that "under such a policy, even if the "condition related to the personalty, it would be but a fair "and reasonable construction to say that the sale named "in the condition referred to each item of separate in- "surance, and that a sale of one class separately insured, "would not affect the other."

In the above case *by the same policy*, the building and boiler, &c., therein, had separate amounts of insurance, as in this case—under one policy and premium.

To the same effect is the case of *Clark* v. *New Eng. Mut. Fire Ins. Co.*, 6 Cush, 342. In that case the same policy covered a tavern and a shop, by a similar provision the policy was to be void if any alienation of the property occurred.

The shop was alienated, and FLETCHER, J. held the policy was void only as to the property alienated, and he observed that the tavern and shop being insured separately, the alienation of one would no more affect the insurance on the other, than if they had been insured in separate policies.

To the same effect is the case of *Phœnix Ins. Co.* v.

Lawrence, 4 Met., Ky. 9, decided in 1862. In that case an insurance policy was taken on a house, and on goods therein, separately, and it was held that the avoidance of the policy on the house, would not render it void as to the goods.

To the same effect is *Loucher & Co* v. *Home Mutual Ins. Co.*, 17 Mo., 247, the case was affirmed in 19 Mo., 628.

In *Associated Ins. Co.* v. *Assum*, 5 Md., 165, (cited by plaintiff in error), MASON, J. held that when the policy was "for $1,000, say $700 on books, &c., and $300 on "music, musical instruments, &c.," that it was a distinct contract of insurance for each class, and that if the policy was vitiated as to one alone, it would not be as to the other. See also:

Bodle v. *Chenango Mut. Ins. Co.*, 2 Comst, (N. Y). 53.

The fact that a deed was made of one of the houses and lot upon which it stood, was not such a change of title as vitiated the policy, even as to that house.

The deed was made to Mrs. Sea, wife of Sidney W. Sea, to hold for her husband, conditionally, that the consideration was wholly paid by Mr. Sea.

It is a well settled rule that a mortgage of property is not an alienation or change of title, within the meaning of such a policy, so as to avoid it.

May on Ins., 297 and 298.
Com. Ins. Co. v. *Spankneble*, 52 Ills., 53.

Nor is a conditional sale an alienation, or a sale made to hold in trust for the party assured.

Tittmore v. *Vt. Mut. Ins. Co.*, 20 Vt., 546.
May on Ins., 298, and cases cited.

In the case at bar, the Insurance Company had notice of the holding of this contract by Sea, and of its terms, among which were that upon the payment of a certain sum, the deed would be made, &c. Suppose the deed

had been made to Sea himself, by Pearson, under the terms of this contract, this would be a *change of title*, just as much as to make a deed to Mrs. Sea; and would it be claimed by the plaintiff in error, that a deed made to Sea, under this contract, of which they had actual notice, would defeat the policy, even as to the property conveyed.

The intention of the policy is, that the risk shall not be changed by any transfer to a stranger, but if the company write a policy upon property held under a contract, which, in terms, provides for a *change of title* during the life of the policy, they must be held to have contemplated such change of title by accepting the risk.

Then, this being the case, the transfer to the wife to be held by her for her husband, is not a change of title that was not contemplated by the policy.

It is not, in fact, a change of title, if a deed to the assured, whereby his equitable title is made absolute, is not a change of title.

In this case, Sea had an equitable title in the house 138 Elm Street, when the insurance was taken, liable to be defeated under this contract after sixty days default.

By the making of a deed by Pearson to the wife of Sea, he having paid the money, and the property being held by his wife, not absolutely, but conditionally, for him, the change of title, if such it may be termed, was one that did not increase the risk, but gave to Sea a more permanent and certain interest in the property, so that a proper construction of the policy, in connection with the information given at the time this company solicited the insurance, would have allowed a judgment for the whole amount of the policy, notwithstanding the conditional deed to Mrs. Sea.

But we did not assign cross-errors, and are satisfied with the judgment given.

III.

Some other points are made by the plaintiff in error, but they are all of a technical character, and have no merit.

In this case, the circumstances that accompanied the fire must be considered — a great city swept away, and its inhabitants scattered — and when one of the agents of the company came to Chicago, after the great fire, he came in fact to the ruins, and had no need of notice to protect any interests of the company.

But he was informed of the loss, and made no objection to its form, and made no objection to the proofs, and justice requires that this company be held to have waived mere matter of form in such a case.

In *Clark* v. *New Eng. Mut. Fire Ins. Co.*, 6 Cush., 340, the court held that the conduct of the defendant upon every principle of fair dealing, must be regarded as a waiver of any further or different notice.

The object for which notice is to be given, must be considered in construing a policy, under circumstances like those in this case.

The Company had notice of this great fire, as the world had, and their agent came here to the ruins, and must be held, even without verbal notice, to have known of the destruction of those buildings, and to have waived any and all further notice.

It would seem that when a case of this kind is based entirely upon technical grounds, without merit in themselves, that a liberal construction should be given. Here no question is made as to the loss, or the value of the property destroyed. No objection was made to the proofs of loss.

The company simply wished a copy of Sea's contract,

of which they had knowledge at the time of the writing of the policy, and he sent them a copy of this contract. His duplicate copy.

The court found that there was no fraud or fraudulent concealment, and this finding is conclusive and will not be reviewed.

So that fair dealing and equity requires that this company, which seems to be one among the few that could pay the sufferers in that calamity something for their losses, should be compelled to do what is just.

Respectfully submitted,

H. G. SPAFFORD,

Attorney for Defendant in Error